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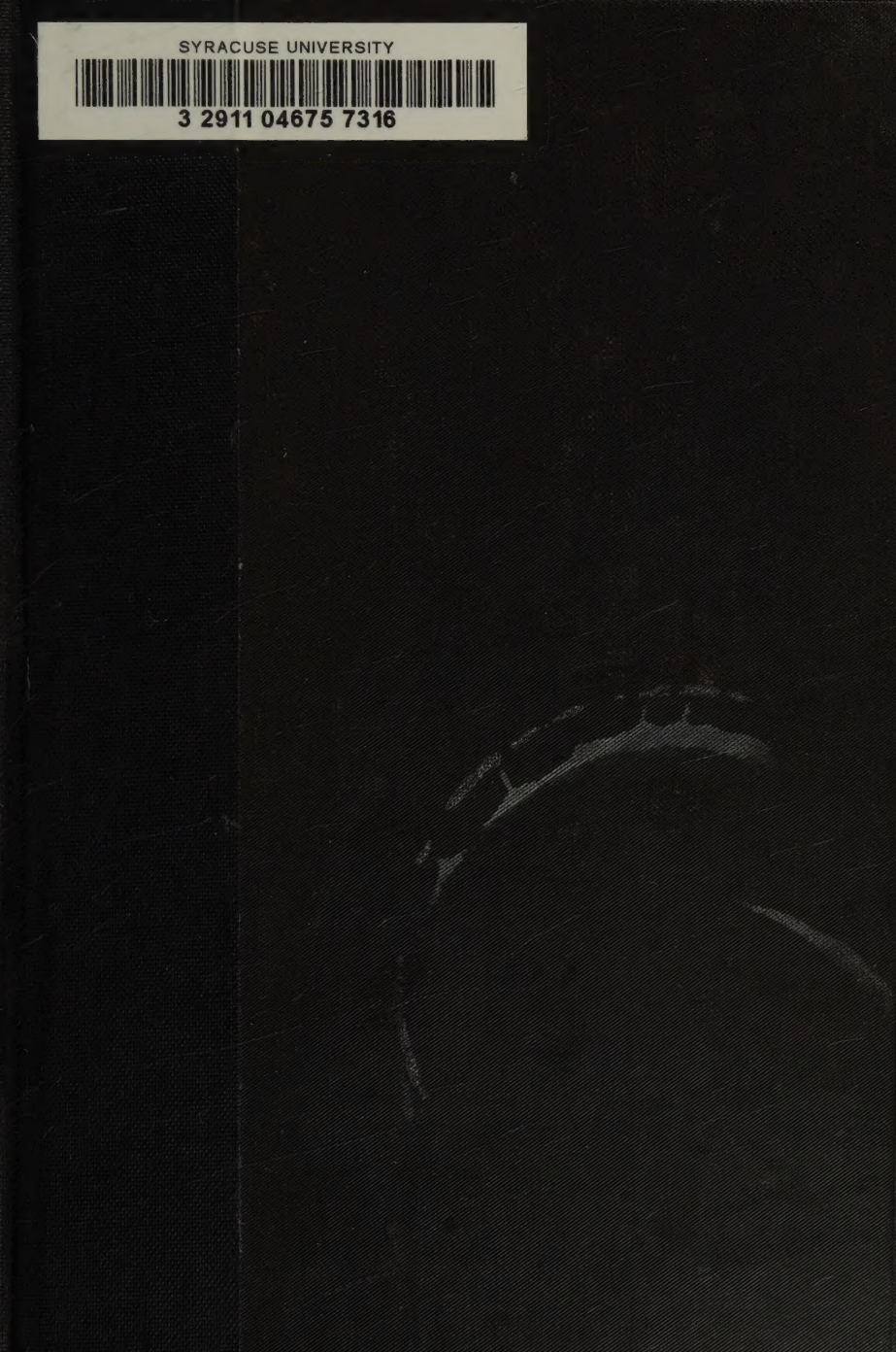

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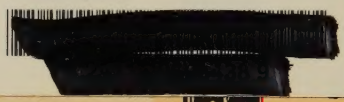

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By David Jayne Hill

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THE GENTLE ART OF LEARNING TO SWIM WITHOUT GOING NEAR THE WATER

"Mother, may I go out to swim?"
"Yes, my darling daughter;
Hang your clothes on a hickory limb,
But don't go near the water."

THE PROBLEM OF A WORLD COURT

The Story of an Unrealized American Idea

By

DAVID JAYNE HILL

Author of a History of Diplomacy in the International Development of Europe

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PREFATORY NOTE

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Washington, D. C.,
January, 1927.

INTRODUCTION

POWERFUL influences have been brought to bear upon the Government of the United States to induce it to authorize adherence to the Permanent Court of International Justice established by the League of Nations. The chief argument in favor of adherence has been that this tribunal is the realization of an American idea long and ardently supported in this country.

In response to this urgency, on January 27, 1926, a resolution was passed by the Senate of the United States authorizing this adherence, with certain reservations intended to indicate that the United States did not commit itself to the obligations of the Covenant of the League of Nations under which the Court had been organized.

The situation resulting from this decision may be best stated in the words of President Coolidge in an address delivered at Kansas City on November 11, 1926:

> "While the nations involved can not be said to have made a final determination, and from most of them no answer has been received, many of

> them have indicated that they are unwilling to concur in the conditions adopted by the resolution of the Senate. While no final decision can be made by our government until final answers are received, the situation has been sufficiently developed so that I feel warranted in saying that I do not intend to ask the Senate to modify its position. I do not believe the Senate would take favorable action on any such proposal, and unless the requirements of the Senate resolution are met by the other interested nations I can see no prospect of this country adhering to the court."

To this it may be added that a committee of the signatories of the Protocol creating this tribunal has recommended that negotiations be opened between the United States and the Council of the League of Nations with the object of arriving at an understanding on this subject.

To facilitate this procedure, a "Preliminary Draft Protocol" has been prepared as the basis of such an understanding. The attitude of President Coolidge on this subject is expressed in the closing sentence of the paragraph quoted above. Evidently the proposed participation of the United States in what has been designated as "The World Court" has reached an *impasse*.

This situation is of an importance that justifies and demands an impartial examination and explanation of its causes. Such an examination and explanation are the purpose of this book.

An intelligent comprehension of this situation requires a brief survey of the international conditions which have on the one hand tended to promote the idea of an International Court of Justice, and on the other to impede its realization.

As a preliminary to the more detailed treatment of the subject in the chapters that follow, such a general conspectus of the essential facts is herewith presented.

The Society of States

Not only in a natural but also in a contractual sense there exists, and since the Peace of Westphalia of 1648 there has continuously existed, a "Society of Nations," voluntarily bound by certain common principles, some of which have been generally recognized as having the force of law.

Inasmuch as these principles have been formally accepted by and applied to only such nations as are organized under recognized governments, the expression a "Society of States" would be more exact. This distinction is based on the fact that not all nations, but only those possessing both sovereignty,—that is, complete self-determination,—and responsible government, and thus capable of being held accountable for their actions, are to be considered members of the "Society of States." Membership

in this Society can be obtained only through formal recognition by the already mutually recognized States.

This Society of States, natural by the juxtaposition of distinct social and political entities, and contractual through the exchange of specific treaties and conventions based on conceptions of duty and honor, has expanded with the spread of civilization and the ever widening acceptance of the rights and duties of Sovereign States. Beginning in Europe, and at first confined to the circle of Christendom, it has been extended throughout the world, until at present it includes all States that are ready and qualified to accept the obligations which membership in this Society implies. Thus, Turkey, long excluded from the privilege of membership, and such Oriental States as Japan and China, which have adopted the fundamental ideas of international right, expressed in the form of definite treaties and conventions, now enjoy recognized membership in the Society of States. Through the new interpretation of "empire" in the terms of a "commonwealth," such originally colonial entities as Canada, Australia, New Zealand, South Africa, and also India and Ireland, if not strictly sovereign, have come to possess at least a quasi-membership in this Society.

The United States of America a Member of the Society of States

From the time of the recognized independence of the American Colonies and the formation of the Union, the United States of America has been a member of the Society of States. As such it has formally, by judicial decisions as well as in practice, accepted the Law of Nations as a part of its own law. It has participated in international conferences having for their object the welfare of the Society of States upon terms of equality with other States. It has formally assisted in the further development of the Law of Nations, and has bound itself in agreement with other States by a great number of treaties and conventions affecting their mutual interests and the peace of the world. Under these treaties, upon definite understanding of the Law of Nations voluntarily agreed upon, it has subjected important interests to the judgment of international tribunals. In all these activities and in other matters of national and international importance, the United States has been acknowledged as a leader in promoting cooperation among the nations, and it has stood preeminent among them for its interest in the peace of the world.

From its earliest history the founders of the American Government were favorable to the substitution

of judicial procedure for war in settling the disputes of nations.

Associations in the Society of States

Within the limits of the Society of States there has been found room for a wide diversity of private associations. In the past these have in the main taken the form of "leagues" and "alliances" composed of particular groups of States, great or small, individually and equally members of the Society of States, but in each case combined together as separate associations for the preservation of their interests or the acquisition of new advantages. In order that some one of these groups might not become universally dominant, they have usually been counterpoised by the formation of others, in such a manner as to create a "Balance of Power," that is, the checking of one group by the counter-weight of another.

In the development of the European States this idea of "equilibrium" has played a preponderant rôle,—indeed, a part so important that since the Peace of Westphalia, which was an attempt to secure the equal rights and develop the autonomy of the separate States that were liberated by the Thirty Years' War from the pretensions of the Holy Roman Empire, the history of the fluctuations of this balance is the chief substance of the diplomatic de-

velopment of Europe, and to some extent of the entire world.

At the close of the World War the idea was engendered that the grouping of States within the Society of States in separate and opposing associations, such as alliances based on national interests only, was in some degree responsible for that conflict.

The thought prevailing in the Conference of Paris, which dictated the Peace, was that peace, being the greatest of all interests, an association should be formed of such preponderant power that it could, in the future, supersede all other associations, and by its overwhelming potency impose and enforce peace upon the whole world. The control of this all-powerful association was to be in the hands of the Great Powers who had won the war.

Unfortunately, this effort suffered from the attempt to combine incompatible ideas in the same organization. The Covenant of the League of Nations was made Part I of the Treaties of Peace which dismembered nations, distributed populations and inflicted penalties in a manner that was felt by many to be unjust. The Covenant created a military and political alliance, primarily of the victors in the war, but soon augmented by smaller neutral powers seeking its protection, which had for its object the maintenance of the *status quo* thus imposed.

To the United States all such mutually protective

combinations within the Society of States, the League included, have appeared to be of the same kind. It seemed preposterous for such an alliance, however extensive, to claim to be in itself the whole Society of States. Not being a member of the League can in no respect deprive the United States of its legitimate place in the Society of States. It would be unendurable that the United States should be denied its rights as a member of the Society of States because it has not become a member of the League of Nations, or that it should be excluded from the enjoyment of equality and independence on the assumption that the League constitutes the Society of Nations.

This League aims to enforce peace, but not necessarily a judicial peace. "The League shall take *any* action that may be deemed wise and effectual to safeguard the peace of nations," the Covenant declares (Article 11). For this purpose it is pledged to use its "preponderant power."

Why the United States is not a Member of the League of Nations

It is precisely because the League rests fundamentally upon "preponderant power," the use of which is solemnly pledged in the Covenant, that the United States has declined to become a member of

the League. The reasons for this decision are clear and incontrovertible. The powers of the American Government are delegated powers, the purposes of which are defined in the Preamble to the Constitution of the United States, from which all its powers are derived. Neither the President nor the Congress possesses unlimited sovereignty. There is in the Constitution of the United States no delegation of power to any organ of Government to declare and carry on war, levy taxes, and impose compulsory military service upon the people, or to engage to do so, for the purpose of guaranteeing the peace of Europe, or of preserving the territorial integrity and political independence of all the signatories of the Covenant of the League (Article 10), including the arbitrary boundaries hastily decreed by the Supreme Council in the Conference of Paris. Even if such powers were possessed by the Government, they could not be transferred to the control of any other authority, such as the Council of the League or a Conference of Ambassadors. They could not even be transferred by the Congress to the President, nor could he be authorized to act automatically in a military way in contingent circumstances, under Articles 10, 11, and 16.

Preponderant Power Non-existent in the League

It should not in any way affect the decision of the United States not to enter the League, that "preponderant power" does not in fact exist in the League, and is not likely to be exercised by it for the preservation of peace. What the United States has to consider is not what the League will actually do, but what its Covenant binds its members to do.

Experience has shown that there resides in the League of Nations no power of effectual restraint upon any Great Power, and that really to punish such a power has never been within the military capacity of the League.

The Greco-Italian imbroglio of 1923 has led an eminent British statesman to declare: "The occupation of Corfu is, I suppose, the most flagrant breach of the public law of Europe that has happened since the time of Napoleon, excepting the invasion of Belgium of 1914."

Although the terms of the Covenant are explicit regarding the duty of the Council in such circumstances (Articles 11, 15 and 16), the Council took no independent action; but, with apparent consciousness of its impotence, referred the complaint of Greece to the Conference of Ambassadors, in which the aggressor, but not the complainant, was represented.

This purely political body, bound by no law, acted because its own interests, and not merely the obligations of the Covenant, were involved. If the League had not existed, Great Britain and France would not have permitted so radical a change in the equilibrium of the Mediterranean as control of the Adriatic through the permanent occupation of Corfu by Italy would imply.

Thus, the machinery of the League, designed to set in motion the "preponderant power" supposed to exist in the League, and to be under its control, was seen not to exist there, but to be in fact in the hands of the Great Powers themselves, to be controlled by them, as their exigencies may require, and not by the Council of the League.

No Permanent Ending of War by War

Experience has already shown that the theory of "preponderant power" in the League is even less effective and trustworthy than the old theory of the "Balance of Power," to which there is a strong tendency to return.

It is illusory to infer that, because the Allied and Associated Powers compelled Germany to peace when they were united in war by a common interest, they would freely engage in another war when the danger was not common to them. The only interests

that appear to have survived the signature of the Treaties of Peace are the national interests, and the signatories have not even been able to unite their forces for the execution of those treaties imposed upon the vanquished.

Even if "preponderant power" were actually possible, as a solution of the problem of peace, it would be simply the consecration of armed force. Diplomacy would continue to play around it for control and possession, as for centuries the Great States have plotted for the prize of universal empire. It would be at its best only another "Holy Alliance," designed to entrench and perpetuate an absolutism almost as terrible as war.

The Political Character of the League of Nations

In the face of its drastic articles calling for military action, like Articles 10, 11 and 16, there are those who endeavor to make the Covenant of the League acceptable to anti-militarists by holding out promises of amendment and interpretation. Demands have been made by members of the League for the suppression or amendment of these articles, but they have not thus far been suppressed or altered. On September 14, 1923, it was stated in the Assembly that, of the fourteen amendments adopted by the Assembly in the previous two years, not one had been ratified by the governments.

Attempts have been made to evade some of the obligations of the Covenant by interpretation, but no definite results have been attained. In 1922 the Canadian first delegate demanded, if not the suppression of Article 10, which had been requested previously, at least a clear interpretation of it, but no conclusive action to that effect has been taken.

The last probability of change would disappear, if the United States were to become a member of the League; for the Powers desiring its guarantees of protection would then have no motive to amend, and could successfully resist amendment, as they have thus far. And the United States would be subject to reproach if it did not use its power to protect the members of the League.

The equivocal character of the League, so long as its Covenant is subject to new interpretations, certainly offers no inducement for the United States to seek membership in it. It would be like signing a blank check.

It may be said, we could escape all obligations by means of broad "reservations." That would be like signing a check with an understanding that it was not to be paid.

The Inadequacy of a Political League of Nations

There has been under the auspices of the League no real disarmament and if the theory of "prepon-

derant power" is to stand, there is no reason why there should be disarmament. Some one must be ready to execute the mandates of the Council or it will be entirely impotent. The doctrine of power has now taken the form that disarmament can be made practicable only by a series of reciprocal guarantees, to be made between themselves by the individual States which are particularly exposed to danger from invasion, and that it is impracticable for even the Great Powers to guarantee by armed force the peace of the whole world. Armed guarantees of peace, for material as well as moral reasons, are likely to become operative only within a limited radius of action, and should therefore be regional. They are not likely to be effective beyond the hemisphere or the continent occupied by the States thus mutually guaranteed.

But if guarantees should be only regional, the United States, not requiring either to give or to receive them, should obviously be dispensed from any armed responsibility for European peace; and, out of consideration for its own peace, would do well not to take sides in settling European political questions, as the League aims to do.

The Alleged World Court

It has been said that, whatever the defects or delinquencies of the League of Nations as originally

organized and thus far operative may be, the deficiency has now been made good by the creation of the Permanent Court of International Justice, often spoken of in the United States as the "World Court."

This plea has had a great influence in the United States. Multitudes of excellent men and women have joined in the demand that the Senate should authorize adherence to this tribunal. The Senate yielded to that insistence, chiefly on the ground that the Statute of the Permanent Court of International Justice is the realization, and the only possible realization, of an American idea. And now, having yielded to this demand, the League's Court is found to be so far from being a World Court in the American sense of the word, that the United States is not permitted to adhere to it without negotiation with the Council of the League of Nations and the surrender of a right which the President and the Senate unite in thinking should not be sacrificed.

Is it not time to look into the history of this unrealized American idea?

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THE PROBLEM OF A WORLD COURT

CHAPTER I

Where the Idea of a Court of International Justice Originated and How It Developed

AT a dinner of the American Society for the Judicial Settlement of International Disputes, held in Washington on December 6, 1913, the Toastmaster introduced the present writer with the words: "I suppose it is now an open secret that he drew the instructions to our delegates to the First Hague Conference, and it was his happy fortune to be our representative at The Hague at the time of the Second Conference."

It is perhaps due to history that those who have participated in events of public interest should leave behind them some record of transactions of which they have had intimate knowledge but regarding which the official records are silent.

Upon the occasion referred to the Toastmaster's form of introduction and the special interest of the Society for the Judicial Settlement of International

Disputes led me to confide to the audience two personal reminiscences related to this subject, and it may not be improper for me to repeat and slightly extend them here.

The Czar of Russia's Rescript on Disarmament

The first recollection recalled the publication of the Rescript which the Russian Minister of Foreign Affairs had caused to be lithographed at the command of Nicholas II and distributed on August 24, 1898, to the diplomatic representatives accredited to His Majesty, inviting their Governments to send delegates to a conference "to consider the grave problem of putting an end to the incessant increase of armaments and to seek the means of warding off the calamities which are threatening the whole world."

"Sitting under the shadow of the Cologne Cathedral a few nights afterward," I said, "having dined in the open air on the terrace of a nearby restaurant, I saw a little boy with a great roll of papers under his arm, who was calling out in German, 'Proclamation of the Czar of Russia about war!' "

There was a great stir in the crowd assembled on the terrace. What had the Czar of Russia to say about war? Was he intending to declare war on some nation?

Five minutes later, when the import of the document was understood, every one was smiling, but it was a smile of indifference and ridicule. "Another piece of Romanoff sentimentalism! Another exploit of imperial impulsiveness!"

Europe generally received the Rescript in a similar spirit of caustic skepticism. In diplomatic circles the invitation provoked smiles. "Disarm the nations? That would be to change human nature!" And yet no Great Power could afford to decline the invitation.

Conversations with the British Ambassador

The second recollection was of November, 1898, in the Department of State at Washington, whither the present writer had been called in October of that year as Assistant Secretary of State.

"One day," I confided to my audience, "the door of my office opened, and the genial face of the Secretary of State, John Hay, appeared in the doorway. As he walked into my room, he said: 'I have brought you a visitor'; and as the door swung wider open Lord Pauncefote, the British Ambassador, entered my office.

" 'Lord Pauncefote,' said the Secretary, 'has brought to the Department a little pamphlet entitled *International Justice,* and has come to talk

with regard to the Czar's Rescript calling the Conference. As your name is on this pamphlet, will you not sit down with Lord Pauncefote and discuss the subject with him?' "

The time has now arrived, since the results of these conversations have passed into history, when it may not be improper to give them a wider audience.

The United States had in the previous September promptly accepted the Czar's invitation. Great Britain had also accepted it, on October 24th, with the reply: "Her Majesty's Government will gladly co-operate in the proposed effort to provide a remedy for this evil; and if, in any degree it succeeds, they feel that the Sovereign to whose suggestion it is due will have richly earned the gratitude of the world at large."

Lord Pauncefote personally shared the doubt regarding the prospect of disarmament thus veiled in his Government's note, and the Department of State was of the same opinion as to the probable success of the Czar's proposal.

As the result of these conversations the conclusion was arrived at on both sides that nothing effective could be accomplished at the coming Conference in the direction of diminishing armament, but it was agreed that it might be possible to start a movement toward the organization of international arbitration.

On January 11, 1899, Count Mouravieff issued from the Russian Foreign Office a second circular note with a supplementary proposal which seemed to offer encouragement to the idea of a possible organization of international arbitration, namely,

> "To accept in principle the employment of good offices, of mediation and facultative arbitration in cases lending themselves thereto, with the object of preventing armed conflicts between nations; to come to an understanding with respect to the mode of applying these good offices, and to establish a uniform practice in using them."

In his reply to this second Russian communication, Lord Salisbury, speaking for Great Britain, said:

> "As regards the eighth point, it is not necessary for Her Majesty's Government to make any fresh declaration of their earnest desire to promote, by all possible means, the principle of recourse to mediation and arbitration for the prevention of war."

In the conversations with Lord Pauncefote it was agreed that the United States and Great Britain should co-operate in supporting the organization of international arbitration and that the delegates from both countries to the Conference should be instructed in this sense.

The Positions of the United States and Great Britain not Identical

In the course of these conversations it became evident that the attitude of Great Britain was not in all respects identical with that which the United States appeared from its traditional policy to be justified in assuming in regard to the part that might be taken by means of law and judicial procedure in settling international disputes.

The Government of the United States was created by a written document in which the powers and duties of government were clearly defined. A Union of States deeming themselves wholly independent and sovereign was founded upon the conception of a fundamental written law which created the government. A Supreme Court had been established for the settlement of disputes by the interpretation and application of the law. Faith in this system had grown in the United States and had become stronger with the experience which time had afforded. Why, therefore, it was natural to ask, if the nations chose to do so, might not they also agree upon a body of laws, an international *corpus juris* by which the nations might be willing to be judged, since it would be their own law, freely accepted by them? And why might not a Court of Justice be established by the nations as well as by the American States, com-

posed of eminent jurists chosen by them, not to *make* the law, or to be guided by private reasons or vague principles, but to *declare* the law previously formulated, agreed upon and ratified by the nations themselves, just as the laws of the United States are made by constitutional conventions and legislatures, which by their *agreement,* and not by their *dictum,* make the laws which the courts declare and apply in concrete cases?

A New Conception of Law Developed in America

This undoubtedly was not the historic idea of the nature of law, which, as Austin had defined it, is "the command of a sovereign imposed upon a subject"; from which he and his school of thought had reached the conclusion, so commonly held by diplomatists, that since there is no international sovereign there is in the proper sense no international law. What is called "international law" is then nothing but a body of accepted customs.

It is not surprising, therefore, that where the Austinian idea of law lingers, international law, so essential to an international court of justice, is regarded as too vague to be considered rigorously.

Lord Pauncefote was strong for arbitration, that is, for some kind of compromise or settlement, to avoid armed strife; but an international court of justice seemed to him a little too much to expect.

In this he was doubtless right. It was too much to expect, in the condition of Europe, and especially of Europe's relation with other parts of the world, that universal rules of action could be arrived at by consent and agreement.

But in America it was not so. The history of government in America since the Declaration of Independence is a history of consent and agreement.

The American idea of an International Court of Justice roots itself in the conception of Constitutional Government. In this the United States was an originator. For the first time in history, a people, having first of all become independent, resolved to constitute a government which could legally make no law it was not authorized by law to make. The idea of a Court of International Justice was, therefore, a necessary corollary to the idea of a freely accepted Law of Nations.

It was quite natural, therefore, that the idea of a Court of International Justice should have had its origin in America. It was not in any sense an individual idea. It was implicitly wrapped up in the essential nature of American institutions; a necessary correlate of American political philosophy, which begins with the assertion of human rights and ends with a system of law designed to afford them legal protection. There had often been in the United States hesitation and refusal by the Senate to ratify treaties

of arbitration with particular nations, but there were for these hesitations and refusals particular reasons. There had also been numerous successful arbitrations. But the occasion for officially proposing an international tribunal of justice had never arisen. Clearly it only awaited a favorable opportunity to propose it, and that opportunity had arrived through the Czar's invitation to discuss the ways of peace.

The Original American Proposal

Motivated by these considerations, the report of a draft of instructions to the delegates to the Hague Conference of 1899 contained a definite plan for an international Court of Justice, as distinguished from a tribunal of arbitration. This plan would never have been proposed had it not been assumed that a Court of International Justice would be guided in its decisions by a code of law adapted to its use.

It was of course well understood that the first obstacle such a plan would encounter would be the doctrine of Absolute Sovereignty; that is, the notion that a Sovereign State may act as it pleases without restraint, since there is no sovereign superior to the State to control it. It is not perhaps a matter of wonderment that the idea of such a court was felt by some other nations to be premature if not forever impossible. But in America we had learned that the

true sovereignty of a nation is not an expression of its *will to control,* so much as an expression of its *freedom to consent.* So far then is consent to law from being a surrender of sovereignty, that it is precisely in the freedom of consent that the sovereignty of a people really consists. In voluntary submission to law there is no abdication of sovereign power. The reason why the United States could be the first to propose a Court of International Justice is related to the fact that the United States of America is the first example in human history of a Government created with the aim and purpose of limiting the action of the Government by law, since the Government itself is a creation of law. It was founded on the idea that law finds its authority in *consent* and not in *force.*

The Contents of the Draft Report

The report made to the Secretary of State, the Honorable John Hay, and approved by him and by President McKinley included three documents:[1]

I. Instructions to the American Delegates;
II. An Historical Résumé; and
III. A Plan for an International Tribunal

[1] Printed in full in *Instructions to the American Delegates to the Hague Peace Conference,* Oxford University Press, 1916, pp. 6–16.

The Instructions signed by Secretary Hay contained the following paragraphs:

"The duty of sovereign states to promote international justice by all wise and effective means is only secondary to the fundamental necessity of preserving their own existence. Next in importance to their independence is the great fact of their interdependence. Nothing can secure for human government and for the authority of law which it represents so deep a respect and so firm a loyalty as the spectacle of sovereign and independent States, whose duty it is to prescribe the rules of justice and impose penalties upon the lawless, bowing with reverence before the august supremacy of those principles of right which give to law its eternal foundation.

"The proposed conference promises to offer an opportunity thus far unequaled in the history of the world for initiating a series of negotiations that may lead to important practical results. The long-continued and wide-spread interest among the people of the United States in the establishment of an international court, as evidenced in the historical *résumé* attached to these instructions, gives assurance that the proposal of a definite plan of procedure by this Government for the accomplishment of this end would express the desires and aspirations of this nation. The delegates are, therefore, enjoined to propose, at an opportune moment, the plan for an international tribunal, hereto attached, and to use their influence in the conference in the most effective manner possible to procure the adoption of its substance or of resolutions directed to the same purpose. It is be-

lieved that the disposition and aims of the United States in relation to the other sovereign Powers could not be expressed more truly or opportunely than by an effort of the delegates of this Government to concentrate the attention of the world upon a definite plan for the promotion of international justice."

The Historical Résumé traced the development in the United States of the idea of international conciliation and the abolition of war from the resolution of the Senate of Massachusetts of February, 1832; that "some mode should be established for the amicable and final adjustment of all international disputes instead of resorting to war," down to President McKinley's Inaugural Address of March 4, 1897, in which he said: "Arbitration is the true method of settlement of international as well as local or individual differences"; ending with a reference to the Arbitration Treaty of 1893 with Great Britain,—then before the Senate for ratification,—as follows:

"Since this treaty is clearly the result of our own initiative, since it has been recognized as the leading feature of our foreign policy throughout our entire national history . . . I respectfully urge the early action of the Senate thereon, not merely as a matter of policy, but as a duty to mankind. . . . It may well engage the best thought of the statesmen and people of every country, and I can not but consider it fortunate that it was reserved to the United States to have the leadership in so grand a work."

The Plan for an International Tribunal, conceived in the form of a resolution to be introduced at the conference, if the occasion seemed opportune, was, I believe, the first official plan for an international court of justice, as distinguished from voluntary arbitration, ever made. It provided for judges learned in international law, instead of arbitrators acting under a *compromis* submitted to them; the court was to have a permanent existence, and was empowered to fix its place and time of session; and the nations creating and maintaining the court, which was to be open to all, were to agree mutually "to submit to the international tribunal all questions of disagreement between them, excepting such as may relate to or involve their political independence or territorial integrity."

The Conferences at The Hague

The First Conference at The Hague held from May 17, 1899 to July 29, was a timid body, convoked under circumstances of distrust and suspicion, and dominated by diplomatic rather than judicial influences. Notwithstanding these impediments, the Conference was saved from entire sterility by a Final Act which embodied many forward steps toward international conciliation.

"On the assembling of the Conference," says the

Report of the American delegates [2] of which the late Honorable Andrew D. White was the chairman, "feeling regarding the establishment of an actual permanent tribunal was chaotic, with little or no apparent tendency to crystallize into any satisfactory institution. . . . The American plan contained a carefully devised project for such a tribunal, which differed from that adopted mainly in contemplating a tribunal capable of meeting in full bench and permanent in the exercise of its functions like the Supreme Court of the United States." The plan actually adopted provided only for a panel of judges, each chosen by his own government, subject to call whenever any two or more governments voluntarily agreed to arbitrate a difference between them, and bearing the title "The Permanent Court of Arbitration." Judges from this panel were convened between 1902 and 1912 for the successful settlement of fourteen cases, of which the first was the Pius Fund Case between the United States and Mexico.

Although it was found impossible in 1899 to organize an international tribunal composed of permanent judges, elected on equal terms, and having jurisdiction over all international law cases, the aim of which should be a decision according to law, and not mere adjustment and accommodation,—in short the application of accepted principles of justice and not

[2] *Instructions and Reports*, p. 22.

compromise,—at the Second Hague Conference, which met from June 15, 1907 to October 18, the original purpose of the Government of the United States was not abandoned.

On October 21, 1904, in announcing the American initiative for the Second Conference at The Hague, Secretary Hay intimated that "its efforts would naturally lie in the direction of further codification of the universal ideas of right and justice which we call international law,"—the essential pre-condition of a real court of legal justice;—adding that "its mission would be to give them future effect." [3]

In his instructions to the American delegates to the Second Conference, May 31, 1907, the Honorable Elihu Root, then Secretary of State, emphasised the following words of caution:

> "The policy of the United States to avoid entangling alliances and to refrain from any interference or participation in the political affairs of Europe must be kept in mind, and may impose upon you some degree of reserve in respect of some of the questions which are discussed by the Conference."

He then recalled to the attention of the delegates the following words with which the American delegates to the First Conference had accompanied their votes:

[3] *American Instructions,* as before, p. 61.

> "That the United States, in so doing, does not express any opinion as to the course to be taken by the States of Europe. This declaration is not meant to indicate mere indifference to a difficult problem, because it does not affect the United States immediately, but expresses a determination to refrain from enunciating opinions upon matters into which, as concerning Europe alone, the United States has no claim to enter."

Mr. Root further cited the following declaration made by the American delegates to the First Conference:

> "Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or policy of internal administration of any foreign State; nor shall anything contained in the said Convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions."

"These declarations," he says in these instructions, "have received the approval of this Government, and they should be regarded by you as illustrating the caution which you are to exercise in preventing our participation in matters of general and world-wide concern from drawing us into the political affairs of Europe."

Having thus forewarned the delegates with regard

to abstention from every merely political question, Secretary Root reverted to the idea of an international court of justice in the following terms:

> "It should be your effort to bring about in the Second Conference a development of the Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. . . . The court should be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments."

In pursuance of this instruction, the American delegation to the Second Conference assisted actively in the further advancement of the procedure to be employed in the already existing tribunal of arbitration and the conventions aiming at the improvement of international law, but labored assiduously for the establishment of an International Prize Court, which finally took the form of a convention, and led the Conference in favoring a Court of Arbitral Justice, a project which reached only the stage of the following resolution:

> "The Conference recommends to the signatory Powers the adoption of the project hereunto an-

nexed, of a Convention for the establishment of a Court of Arbitral Justice and its putting in effect as soon as an accord shall be reached upon the choice of the judges and the constitution of the Court."

This project has never become effective; but it is important to note that, in the terms of the Report signed by the Honorable Joseph H. Choate, as chairman of the American delegation, it was not intended to be submitted as a mere "plan or a model, but for adoption as the organic act of the Court"; which "goes forth not only with the approval of the Conference, but as a solemn act adopted by it." But one essential step was still left to be taken, the selection of the judges.

The War and the League

The Third Conference at The Hague, provided for at the final sessions of the Second Conference, was never convoked. At the date when it was due to be convoked, 1915, the World War was at its full tide. A recurrence to arms, long preparing, which it had been hoped to avert, was asserting the sovereign will of Power against the loyalties and the decencies of Right.

It is unnecessary here to dwell upon the holocaust of blood and fire that devastated the invaded lands and assaulted peaceful commerce on the sea.

Our problem now is peace; if possible, peace through justice.

It was difficult amidst the devastations of war, which demanded reparation, even to discuss the problem of permanent peace. At Paris, in 1919, the only peace possible was a peace of victory, and the Treaty of Versailles was the result. The break with the traditions and the achievements of The Hague was complete. The end in view at that time was to enforce the peace by the means that had obtained victory,—armed force.

Part I of the Treaty of Versailles organized for this purpose the League of Nations, under a written constitution intended to supersede all previously existing international arrangements. Its controlling idea was the substitution of the forceful control of nations in place of their voluntary obedience to law. The centre of gravity of this system was to be the Council of the League, under the administration of the Great Powers, not a Court of International Justice. The Honorable Elihu Root complained at the time:

> "The scheme practically abandons all effort to promote or maintain anything like a system of International Law or a system of arbitration, or of judicial settlement, through which a nation can assert its legal rights in lieu of war. It is true that Article 13 mentions arbitration and makes the parties agree that whenever a dispute arises which

they recognize to be suitable for submission to arbitration they will submit it to a court 'agreed upon by the parties.' That, however, is merely an agreement to arbitrate when the parties choose to arbitrate, and it is therefore no agreement at all. It puts the whole subject of arbitration back where it was twenty-five years ago.

"Instead of perfecting and putting teeth into the system of arbitration provided for by the Hague Conventions it throws those conventions upon the scrap heap. By covering the ground of arbitration and prescribing a new test of obligation it apparently by virtue of the provisions of Article 25 abrogates all the 200 treaties of arbitration by which the nations of the world have bound themselves with each other to submit to arbitration all questions arising under International Law, or upon the interpretation of treaties.

"It is to be observed that neither the Executive Council nor the Body of Delegates to whom disputes are to be submitted under Article 15 of the agreement is in any sense whatever a judicial body nor an arbitral body. Its function is not to decide upon anybody's right.

"This is a method very admirable for dealing with political questions; but it is wholly unsuited to the determination of questions of right under the Law of Nations." [4]

Clearly, after what Secretary Root had declared in his instructions to the delegates to the Second Hague Conference regarding abstention from the

[4] Mr. Root's Letter to Mr. Will H. Hays, March 29, 1919; quoted and reinforced in the Letter to Senator Lodge, June 19, 1919. See *American World Policies*, Doran, 1920, pp. 233, 240.

political affairs of Europe, he and those who thought with him could not advise the acceptance by the United States of the obligations of this League. A long debate followed in the Senate and in the press upon the question of ratifying the Treaty of Versailles, in which the Covenant of the League of Nations was the chief object of attack; and a decision was reached in the United States, confirmed by two subsequent Presidential elections, not to accept membership in the League of Nations. As a consequence, instead of ratifying any portion of the Treaty of Versailles, a separate peace was made with the Powers with which the United States had been at war.

The League's Court

From the beginning of the peace negotiations at Paris, it was made evident, through the efforts of certain Powers that had not wholly abandoned their faith in institutions of justice, that some provision must be made for determining questions of international law and justice, without leaving all decisions to the Council of the League, as authorized by Articles 11 and 16 of the Covenant. Mr. Root, as we have seen, was one of the first to voice this necessity.

In President Wilson's original corrected draft of the Covenant of the League of Nations [5] there was

[5] See Lodge, *The Senate and the League of Nations,* Scribners, pp. 103–117.

no suggestion of a Permanent Court of International Justice, nor any reference to the then existing Permanent Court of Arbitration at The Hague. It was the Council of the League which was to judge, to decide and to rule. It was not long, however, before the idea of a Court was brought to attention. Mr. Root's sharp criticism, already quoted: "Instead of perfecting and putting teeth into the system of arbitration provided for by the Hague Conferences, it throws those conventions upon the scrap heap," could not be resisted. Accordingly, in order to make provision for a Court in the Covenant, Article 14 was framed as an amendment in the following terms:

> "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

The plans for the establishment of the Permanent Court of International Justice, it should be noted, were to be formulated by the Council of the League, and submitted to no others than the members of the League. The Court was to have no compulsory jurisdiction, but was to serve as the advisor of the League regarding its legal rights; thus making it not

only "the judicial organ of the League of Nations," but also its legal counsel—"a most essential part of the organization of the League of Nations." [6]

Article 14 having been thus introduced as an amendment of the original draft of the Covenant, Mr. Root further proposed the following addition to this Article:

> "The Executive Council shall call a general conference of the Powers to meet not less than two years or more than five years after the signing of this convention for the purpose of reviewing the condition of International Law, and of agreeing upon and stating in authoritative form the principles and rules thereof.
>
> "Thereafter regular conferences for that purpose shall be called and held at stated times."

This proposal, though supported later, as we shall see, by the Commission of Jurists in their Report to the Council of the League on the Statute of the Court, was not adopted.

Pursuant to Article 14, as it stands, on February 13, 1920, the Council of the League invited the aid of a commission to prepare a report on the organization of the Court.[7] Of the twelve members of this commission all were nationals of States that were

[6] *Official Journal* of the League, March, 1920, pp. 37–38.

[7] *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists,* by James Brown Scott. Carnegie Endowment for Peace, Washington, D. C.

members of the League of Nations, with the exception of the Honorable Elihu Root. The invitation extended to Mr. Root, then not engaged in any public office, was a tribute to his high character as a jurist and in recognition of his interest in the subject.

In the letter of invitation extended to these twelve jurists assurance is given that the proposed Court "is a most essential part of the organization of the League of Nations." [8]

On June 16, 1920, the Commission met at The Hague to prepare the project of the Court. It was fitting that Monsieur Leon Bourgeois, an eminent French statesman who had served as first delegate at the First and Second Hague Conferences, should have been chosen to state the object of the Commission. "The recollection of those Conferences," said Monsieur Bourgeois, "can never pass from the memory of those who had the honor, and there are some of them amongst you, to take part in them. It would be unjust to allow those first steps in the organization of justice to be forgotten."

It was natural that Mr. Root, who had instructed the American delegates in 1907 to propose an International Court of Justice, should recall to the attention of the Commission the endeavors of the Second Hague Conference in this direction by proposing the following resolution:

[8] *Official Journal,* March, 1920, pp. 37–38.

"That the Commission adopt as the basis for consideration of the subject referred to it the Acts and Resolutions of the Second Peace Conference at The Hague in the year 1907."

Although other plans of organization were presented for discussion, the work of the Commission of Jurists was, unquestionably, so far as the Commission itself is concerned, intended to be linked on as a continuation of the achievements of the Hague Conferences, to which it rendered distinct homage as having "prepared with exceptional authority the solution of the problem of the organization of a court of international justice."

The Statute of the Court

The proceedings of the Commission of Jurists in preparing the Statute of the Court, which defines its organization and fixes its authority, are given with sufficient fullness in the work of Dr. Scott last cited. It was understood, of course, that the Commission was invited to prepare a Statute for a Court to be established by the League of Nations alone, and the details of the plan are a result of this limitation. This fact rendered possible the solution by the Commission of certain problems which it had been found difficult to solve. The Court of Arbitral Justice proposed by the Second Hague Conference had met

what at the time was felt to be an insurmountable obstacle. The Great Powers had refused to accord to the Small Powers an equal voice in the election of judges. The organization of the League of Nations offered a means of overcoming this obstacle. The Council was composed of the Great Powers with a minority of the Small Powers, while in the Assembly all had equal representation. This suggested to Mr. Root the idea that it might prove acceptable if those judges, and those judges only, upon whom both bodies, voting separately, could agree were to be chosen to constitute the Court. The organization of the American Congress served as an illustration of how the interests of the small states could be safeguarded by a small body, like the United States Senate, and the interests of all the states by a large body, like the House of Representatives, in which the large states would have a more numerous representation.

While it is obvious that there is in fact no analogy between the Council and the Senate, most of the small nations having no permanent representation in the Council, the idea of two separate bodies appeared to the Commission to afford a solution of the problem, and it was recommended:

> Article 3. That the Court shall consist of 15 members: 11 judges and 4 deputy-judges. The number of judges and deputy-judges may be hereafter increased by the Assembly, upon the proposal

of the Council of the League of Nations, to a total of 15 judges and 6 deputy-judges.

Article 4. The members of the Court shall be elected by the Assembly and the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

Article 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration, belonging to the States mentioned in the Annex to the Covenant or to the States which shall have joined the League subsequently, inviting them to undertake, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.[9]

By this device it was believed by the Commission the problem of the election of judges could be satisfactorily solved. Article 10 of the Project, and the Statute of the Court as adopted, therefore, read: "Those candidates who obtain an absolute majority of votes in the Assembly and the Council shall be considered as elected."

It should be noted that, as this Court was to be exclusively the Court of the League, to which only members of the League were eligible, no general provision was made in the Project for the adherence of any State not a member of the League. It was

[9] *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists,* by James Brown Scott, Carnegie Endowment, 1920, p. 150.

not contemplated at that time that any State not a signatory of the Treaty of Versailles would ever be eligible to vote for the judges of this Court; hence the right of election was confined absolutely to the Council and the Assembly of the League as the electoral bodies.

It should not be forgotten that, in the summer of 1920, while the Commission of Jurists was sitting at The Hague elaborating a Project for the League's Court, the position of the United States of America in regard to the League was not yet defined. President Wilson, "in his own name and by his own authority," had signed the Treaty of Versailles, the first part of which consisted of the Covenant of the League of Nations, but the Senate had declined to ratify the treaty. A Presidential election was pending, the issue of which might, and did, determine the ultimate attitude of the Government of the United States toward the League. The presence of Mr. Root in the Commission of Jurists was not official. He was there, by invitation of the Council of the League, as a jurist of distinction and not as a public officer. Hence it happened that the United States, although referred to in the Protocol as "mentioned in the Annex"—the vestibule to the League, being a list of the States that had signed but not ratified the treaty—was not in any sense a participant in the preparation of the Project for a Court which,

with modifications made by the Council of the League, eventually became the League's Permanent Court of International Justice.

It is unnecessary in this place to analyze in detail the Statute of the Court, and it is even less necessary to pass any criticisms upon it. It was prepared by capable men for a specific purpose, namely, to constitute a Court for the League of Nations; which aimed to become the organized Society of Nations for the entire world, excluding from that Society those nations which would not assume the obligations of the League.

The United States, by its refusal to ratify the Treaty of Versailles was thus in effect placed in this latter class. Whatever may be the attitude of parties and individuals on this subject, the Government of the United States has at present no legitimate place in what is called "the Annex," in which it is mentioned as an expectant member of the League of Nations; for, whatever privilege that mention may confer has thus far been respectfully declined, first, by a refusal to ratify the treaty to which it relates, and, secondly, by the negotiation and ratification of separate treaties with the Central Powers which render a future ratification of that treaty superfluous and improbable.

It is of interest to note that the recommendation, unanimously adopted by the Commission of Jurists,

which the American member deemed of most importance, and which had in substance been sent to Paris from Washington with the strong endorsement of American jurists at the time when the Treaty of Versailles was in process of negotiation, was wholly disregarded by the Council of the League, as it had been in the negotiations at Paris. The recommendation is as follows:

"The Advisory Committee of Jurists, assembled at The Hague to draft a plan for a Permanent Court of International Justice,

"Convinced that the security of States and the well-being of peoples urgently require the extension of the empire of law and the development of all international agencies for the administration of justice,

"Recommends:

"1. That a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable for the following purposes:

"1. To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.

"2. To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.

"3. To endeavor to reconcile divergent views

and secure general agreement upon the rules which have been in dispute heretofore.

"4. To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

"II. That the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association, and the Iberian Institute of Comparative Law be invited to prepare with such conference or collaboration *inter sese* as they may deem useful, projects for the work of the Conference to be submitted beforehand to the several Governments and laid before the Conference for its consideration and such action as it may find suitable.

"III. That the Conference be named Conference for the Advancement of International Law.

"IV. That this Conference be followed by further successive conferences at stated intervals to continue the work left unfinished."

The most hopeful sign in the development of the League of Nations, as an organization for peace, had been its consent to turn again to the jurists for aid and counsel in making the League an organ for justice, instead of an organ for the armed enforcement of peace, which it was originally planned to be. It was, therefore, disappointing when, having received this aid and counsel, the Council of the League, disregarding this advice, manifested a disposition to

appropriate the Court entirely, as an auxiliary of the League, a political and military alliance, free to exercise its own authority under its own rules, as provided for in Article 20 of the Covenant which, in the following terms, assumes to render null and void all engagements inconsistent with the obligations of the League:

> "The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof."

The Court and the Law

The manifest reluctance on the part of the League of Nations to pursue the further development of international law along juristic lines, as proposed by the Commission of Jurists, quite naturally raises the question, By what law are the decisions of the Permanent Court of International Justice to be governed?

The Court, created under the Covenant by the League of Nations, chosen and maintained by the League, will certainly not repudiate any portion of this charter from which it derives its being, and which, therefore, is its fundamental law; and if it is

its fundamental law, then the judges of this Court are bound to hold that no law inconsistent with the terms of the Covenant of the League of Nations can be binding upon States that have accepted Article 20 of this Covenant.

It results, therefore, that the law applied by the Permanent Court of International Justice will be primarily the engagements of the Covenant, as understood by the judges, with such application to States not members of the League as may seem to them appropriate.

The future growth of international law, from the point of view of the League, is not to be determined by the free acts of Governments under the advice of jurists, in the form of general laws to be ratified by legislative bodies, as proposed by the Commission of Jurists, but by the decisions of the Court itself, as from time to time it may pronounce judgment upon the cases brought before it.

It may, no doubt, be said that the common law in certain countries has grown up in this manner by judicial decision; and that, therefore, it would be in harmony with that system that international law also should grow in the same manner.

This observation overlooks two important considerations: (1) That municipal judges derive their authority from the sovereignty of the State in which they act, while in the field of international legisla-

tion there is no single sovereignty from which that authority is derived; so that it is absurd, as Mr. Root has pointed out, to assert that a French judge may create the law for Italy, or an Italian judge for France. (2) That the Supreme Court of the United States, for example, does not *make* the law, but only *declares* what, under the limitations of the Constitution, the law made by our legislative bodies actually is. Were the Court of International Justice restrained by no law, and were it free to declare to be law its own decisions, however just these might be, the Court would possess and exercise an unlimited universal sovereign power, superior to that of any single State, and even to that of all the States combined, if they were under obligation to obey it.

It is, therefore, only by framing projects of law which may be accepted and ratified by the legislative bodies of Sovereign States to which the law is to be applied, that is, by their previous consent, that international law can grow, and at the same time possess real and undisputed authority.

Some inkling of this seems at last to have dawned upon the Council of the League of Nations, which already has become aware that it must adjust its policies to the demands of self-governing nations; with the result that, despite the rejection of the chief recommendation of the Commission of Jurists, it has announced its determination itself to supervise the

codification of international law; quite plainly taking care that the process does not proceed so far as to affect any matter which is vital to the interests of the League, such as its own right to make war to enforce peace, or to impose it upon unwilling States.

The Cause of Justice and the Cause of Peace

More and more, with the passing of events, it is made clear that the cause of justice and the cause of peace are not identical. There may be peace without justice. The aim of a World Court of Justice is not peace alone, it is peace with justice; or, more precisely, it is justice, from which alone peace can be assured.

There are many human interests besides justice which are served by peace; and, therefore, there exist many reasons why peace is sometimes preferred to justice from the hand of power. A court of justice is distinguished from a tribunal of compromise chiefly by the fact that its decisions are in accordance with a rule of law.

The great task, therefore, in the development of a World Court of Justice is not so much the mechanical organization of a body of men to judge and decide questions of disagreement, as previous general agreement on the part of the nations of the world as to what the matured opinion of mankind considers just in the intercourse of nations. This, as the Commis-

sion of Jurists saw it, is the great problem to be solved, and they recommended a definite method of solving it.

This method opens before us a vast vista of future endeavor. It will not satisfy our consciences to win a temporary and fruitless triumph, setting up an impotent court, before which a wronged nation can not bring its adversary; and then, with folded hands, to say, "Now we have created a court, let the court do the rest"!

We shall, however, make no progress toward the goal, if we decline to approve of steps in advance already taken, because they have not gone the whole distance.

In the Permanent Court of International Justice established by the League of Nations, we have an accomplished fact. The Court, such as it is, exists. It is probable that, in some modified form, it is the only Court of International Justice that can rally to its support so many Sovereign States. The question is pressing upon us, therefore, What shall be the attitude of the United States toward this Court? Something already accomplished is now before us. We have followed in outline the course of its preparation. There remains to be considered the statement of the Problem to which it has given rise and of its Solutions, as these are presented to us at the present time.

CHAPTER II

The Problem Created For the United States by the League's Appropriation of the Idea of a Court

IT IS only to a limited extent that the Permanent Court of International Justice established by the League of Nations realizes the object aimed at in the instructions to the delegates to the Hague Conferences of 1899 and 1907. It is a Court entirely without compulsory jurisdiction, even for the most simple justiciable cases. This is in pursuance of the terms laid down in Article 14 of the Covenant of the League, "that the Court shall be competent to hear and determine any dispute of an international character *which the parties may submit to it.*"

This was not, however, the plan submitted by the Commission of Jurists, which defined the jurisdiction of the Court as follows:

> "Between States which are Members of the League of Nations, the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature, concerning:

"(a) The interpretation of a treaty;
"(b) Any question of international law;
"(c) The existence of any fact which, if established would constitute a breach of an international obligation;
"(d) The nature or extent of reparation to be made for the breach of an international obligation;
"(e) The interpretation of a sentence passed by the Court.

"The Court shall also take cognisance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties."

A Court Without Jurisdiction

In framing the Statute of the Court adopted by the Assembly of the League, the Council rejected this proposal of the jurists, which, to use Mr. Root's metaphor, "put teeth in the Court"; at the same time making it optional for any member State to sign an acceptance of compulsory jurisdiction, if it chose to do so, either in a limited or an unlimited sense. It is worthy of remark that the Great Powers have not availed themselves of this option. It is doubtful if the United States would avail itself of the option, so long as international law remains in an undeveloped condition. It could safely accept compulsory jurisdiction only when the law is so far developed that a reasonable forecast could be made of what the law would require and what it would dis-

allow, and when the duty of the Court would be simply to declare the law in its decisions.

This absence of compulsory jurisdiction, even in the most plainly justiciable cases, is sometimes advanced as a reason for immediately participating in the Court as a member, regardless of all obstacles, on the ground that it will never be necessary to meet an adversary before this Court; and it will be, therefore, just as safe to be in it as to be out of it! This adventure in reasoning has called forth the answer, that adherence to the Court, upon this principle, would be wholly superfluous; since the Court is at present accessible for judgment even to non-member States, if they can induce their adversaries to meet them there!

For all the really vital matters of international interest, it is obvious that, until an aggressor can be brought before this Court for judgment, it is mere dupery to imagine that the Court has any relation whatever to the question of war or peace. So long as it is legal for one nation to make a warlike assault upon another, and there is no tribunal of justice before which the wrong-doer can be cited to appear, it is illusory to suppose that a bench of judges, however learned and however just, has any relation to the subject. The fanfaronade that joining the Permanent Court of Justice in its present state of development is a protest against war, discloses com-

plete ignorance of the powers of this Court. The Court has at present no power to cite before it any aggressor for any cause, or to give aid to any victim of aggression, great or small. Nor could it condemn an aggressor even if he consented to appear before it, until there is a law against war-like aggression that could be applied by the Court.

But it is not the absence of jurisdiction that presents the serious problem for the United States and other nations in relation to this Court. The question of jurisdiction is a question relating to the development, not to the judicial entity of the Court. Given the Court, by the voluntary agreement of the nations, its jurisdiction could be extended. A criticism directed against this Court because of its present lack of jurisdiction is, therefore, not a conclusive criticism. It could with equal justice be brought against any international court that could be formed, so long as the Great Powers continue to trust in their strength rather than in their right; and they will trust in their strength, and not in their right, so long as their rights are not clearly defined in the law. In time, this Court may be provided with an adequate law, which will secure for it the confidence of the world, and thus enable the nations with assurance to intrust all justiciable causes to the jurisdiction of a Court whose decisions are made under a rule of law.

The Court as an Advisory Agent

A more real embarrassment confronting the United States in considering adherence to the Protocol of the Permanent Court of International Justice arises not so much from the imperfections of the Court, which might perhaps be overcome through further development; but from a peculiarity in its organization which renders it doubtful whether it really aims to be a World Court of Justice, or something different.

If the Permanent Court of International Justice were indisputably a World Court of Justice, however imperfect, it would be in the line of American tradition to become a participant in its organization and maintenance. The question therefore arises, Is this Court in reality a World Court of Justice, or is it merely an organ of the League of Nations designed to serve its distinctive purposes?

There is a peculiarity in the functions of this Court which has given rise to the suspicion that it is not so much designed to be a court of justice as a shield for the political and military procedure of the League, by giving its actions the *éclat* of judicial approbation. Why, it is asked, after emasculating the Court by giving it no jurisdiction of a judicial character, was this sentence inserted in Article 14 of the Covenant:

"The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly"?

Very innocent, in appearance, is this non-judicial function. May not the League seek legal advice? Certainly. But why should it seek it from its own Court? In doing so is it not charging its Court with a *protective* rather than a *judicial* function? Is it not preparing the way to say to the Court: "We have given you no power to cite *us* before *you,* but we reserve the power to cite *you* before *us,* to defend our procedure before the world by covering it with the ermine of your prestige as a Court"?

Thus far, at least, the advisory opinions of the Court have greatly outnumbered its decisions. Of nine questions before the Court in its first two years of existence, eight were on request of the Council. And it is the Council or the Assembly alone that can thus interpellate the Court. No wrong-doer can be brought before it, without his consent; but the Court, upon mere inquiry by the Council, can render an "opinion" without hearing a case!

The Problem of the Protocol

But there remains a legitimate question, worthy of most careful consideration, "Is this Court really a World Court?"

If anywhere, the definitive answer to this question is to be found in the act which, as the result of long preparation, finally created the Permanent Court of International Justice. This act, called the "Protocol," has been differently described and interpreted. In the literature of propaganda issued to favor the signature of this Protocol by the United States, a legend has been promulgated that the Protocol is "a special and independent treaty signed by the various sovereign nations," without any relation to the League of Nations, and therefore a World Court, and not a League Court. To give this legend—I forbear from using a stronger term —the general credence at which the propaganda aims, it is asserted that the Statute of the Court in question "was referred to the various sovereign nations, for their acceptance or rejection, by a special independent treaty or 'Protocol'. It has been signed by forty-seven States, of which thirty-six have completed their formal ratification. This ratification by the Nations is the authority in virtue of which the Court actually came into being and is now working." [1]

Is this wide-spread representation the truth, or is it not? The answer is found in the Protocol itself.

It is interesting to note that the text of this document has not been generally circulated with the state-

[1] Circular issued in the name of The Federation of Churches for "World Court Week" (Nov. 5–10, 1923), soliciting a fund of $30,000 for publicity, letters to pastors, etc.

ments above quoted, has never been seen by hundreds of thousands of those who have believed these statements, and an earnest seeker after truth, in average circumstances, looking for a copy of the Protocol for his information would not know where to find it.

The full text of this document reads as follows:

"PROTOCOL OF SIGNATURE RELATING TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE

December 16, 1920

"The members of the League of Nations, through the undersigned, duly authorized, declare their acceptance of the adjoined statute of the Permanent Court of International Justice, which was approved by a unanimous vote of the Assembly of the League on the 13th December, 1920, at Geneva.

"Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned statute.

"The present protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

"The said protocol shall remain open for signature by the members of the League of Nations

and by the states mentioned in the Annex to the Covenant of the League.

"The Statute of the Court shall come into force as provided in the above-mentioned decision.

"Executed at Geneva, in a single copy, the French and English texts of which shall both be authentic.

Optional Clause

"The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory, *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the statute of the Court, under the following conditions: . . ." [2]

With this text before him, it is desirable that the reader should himself answer the question whether or not this is a World Court, or only the Court of the League which has brought it into being.

To aid his inquiry, it may be observed that Article 14 of the Covenant, in authorizing the formation of plans for a Court, provides that the Council, after formulating them, shall "submit the plans to the members of the League for their adoption," but names no others. The Protocol is evidently the formula chosen for this submission and adoption.

Examining the Protocol itself, it may be observed:

[2] Official text issued by the League of Nations, quoted in *American Journal of International Law,* April, 1923, pp. 55–56.

(1) that the only nations mentioned in this Protocol are the members of the League of Nations and "States mentioned in the Annex"; (2) that the Statute of the Court was never approved by any other nations than those voting in the Assembly of the League on the 13th December, 1920, at Geneva; (3) that the present Protocol was drawn up in accordance with that decision alone; (4) that the Statute of the Court was submitted for approval to no nations who were not members of the League; (5) that the ratifications are to be sent to the Secretary General of the League; (6) that the Secretary is not authorized to notify the ratifications to any nations that are not members of the League; (7) that the ratifications shall be deposited in the archives of the League; (8) that the Protocol after adoption remains open for signature only to members of the League and States mentioned in the Annex to the Covenant of the League; (9) that the Statute of the Court shall come into force as provided in the decision of the Assembly of the League; (10) that the Protocol, executed at Geneva, in a single copy, the French and English texts of which shall both be authentic, remains in the archives of the League, but no provision is made, in compliance with Article 18 of the Covenant, for the registration of this Protocol as an "international treaty." It is merely "deposited" as an agreement between the members of the League.

Is the "Protocol" a "Treaty"?

The general public does not burden itself with diplomatic distinctions. When it is told that a document is a "treaty," it believes it, even though it is called a "protocol." The difference does not seem alarming!

But why refer to it as an "independent treaty"? Even the most innocent portion of the public, if it had been informed, would distinguish between a treaty open to and actually signed by "various nations" and a document only supplementary to a treaty which the United States had declined to ratify, and executed only by those who had ratified the treaty. Was it in good faith that those who knew obscured the fact, or was it obscured because those who spoke of a "treaty" and "various nations" did not know?

In the general usage of diplomatic intercourse a "treaty" is one thing; and a "protocol" is another.

In his authoritative work, *A Guide to Diplomatic Practice,* Sir Ernest Satow explains the word "protocol" as "derived from the Low-Latin *protocollum,* the 'first glued-in,' " having reference to a subordinate document attached to a book or original document to which it stands in the relation of a supplement. The word is also sometimes applied to a preliminary document meant to serve as an agreement

regarding subsequent procedure. Defining the word, Sir Ernest writes:

> "Used to denote the form taken by an international compact, the word may be regarded as describing a somewhat informal record of an agreement between the High Contracting Parties."

It is precisely in this sense that the word "Protocol" is used in the present instance. It is a final acceptance by members of the League of a plan provided for by Article 14 of the Covenant of the League, namely, the Statute of the Permanent Court of International Justice, as already prepared by themselves in the Council, and formally adopted by themselves in the Assembly. It is astonishing that anyone should disfigure this document for the purpose of imposing it upon the public by calling it "an independent treaty signed by various nations." There is not in the history of diplomacy a more palpable endeavor to "put over" something by changing its name.

The Secretariat of the League of Nations never thought of putting forth the substance of the Protocol as "an independent treaty signed by various nations." That was reserved for American ingenuity.

If we make all due allowance for ignorance, and suppose that to certain minds any international agreement may be properly regarded as a "treaty," it

does not require much research to arrive at the conclusion that the document in question has not the origin or nature of an "independent treaty." It depends not only for its origin but for its aim upon a series of operations necessary to the execution of Article 14 of the Covenant of the League of Nations. So far is this Protocol from being an "independent treaty," that it is clearly only a supplementary step in the execution of the Treaty of Versailles, of which Article 14 of the Covenant is a part. No plenipotentiaries are named, no seals are attached. The document is merely signed by the members of the League of Nations, in whose name alone it is drawn, and deposited in its archives.

Why the United States is in the Annex

This last statement, that the Protocol is a supplementary document necessary to the execution of the Treaty of Versailles, is the only explanation of the exceptional right of the United States of America, from the point of view of the League, to be a signatory of this Protocol.

This right arises exclusively from the fact that the United States is "mentioned in the Annex to the Covenant."

What then is the "Annex to the Covenant"? it is a list of those nations whose representatives signed

the Covenant of the League at Paris as a part of the Treaty of Versailles. In drawing up this Protocol, it was not any special grace toward the United States, Hedjaz and Ecuador alone that admitted them to the privilege of signature to this document. Being "Original Members of the League of Nations, Signatories of the Treaty of Peace," as the Annex is defined in the Treaty of Versailles, these three nations could not be ignored. They were at that time waiting, as it were, in the vestibule of the League; and therefore it was prescribed that "the said Protocol shall remain open to them for signature."

On the slender ground that the Protocol remains "open" to the signature of these nations, the legend of the Protocol was made to say, that when the Council and Assembly of the League "proceed to the election of judges for the Court, they sit and act, not as a League, but as electoral agents for the nations"![3]

"For the nations"! What nations, except the members of the League? What other nations have ever authorized the Council and the Assembly to sit and act for them?

The Solutions of the Problem

To every person who has examined this subject it is so obvious that the Permanent Court of Inter-

[3] Circular above referred to.

national Justice is merely the League's Court, and not a World Court, that the question has become acute, If the United States decides to participate in this organization of the Court, how can it do so, with dignity and without self-stultification, without becoming at the same time a member of the League?

For those who believe that the United States, notwithstanding all that has happened, is still in the Annex, waiting to enter the League, and should not hesitate to cross the sill into the League, there is, of course no problem, and hence there is required no solution.

But, on the other hand, for those who think the United States has done well not to join the League, and that it does not properly belong even in the Annex, the problem of how to participate in the Permanent Court of International Justice, and to make it appear a World Court when, even with the United States as a signatory of the Protocol, it would still be the League's Court, the problem is grave and the solution is difficult. If the Court is, in fact, as the *Official Journal* declares, "a most essential part of the organization of the League of Nations," how can the United States become a part of a part, without becoming a part of the whole?

It should further be considered that, were the United States to sign the Protocol, that action alone would give it none of the privileges of the Court

that it does not now possess as an outsider. Unless something is done to alter the Protocol or to construe the Statute of the Court which the Protocol is drawn to accept, the United States would have no voice even in the election of judges, which by the Statute is confided solely to the Council and Assembly of the League, to which there is no admission provided except through entrance into the League as a member.

All the solutions of this problem are forced to recognize this condition of fact. Whoever wishes to enter the Court officially without also entering the League is obliged to face it. What then is the solution?

The Harding-Hughes Reservations

On February 24, 1923, President Harding sent to the Senate a message recommending participation of the United States in the Permanent Court of International Justice.[4] This message was accompanied by a letter under date of February 17, addressed to the President by the Honorable Charles E. Hughes, Secretary of State, descriptive of the Court and commending adhesion to it upon the following conditions and understandings to be made a part of the instrument of adhesion:

[4] *Congressional Record*, 67th Cong., 4th sess., Vol. 64, No. 74, p. 4508.

"I. That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Covenant of the League of Nations constituting Part I of the Treaty of Versailles.

"II. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states members respectively of the Council and Assembly of the League of Nations in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.

"III. That the United States will pay a fair share of the expenses of the Court, as determined and appropriated from time to time by the Congress of the United States.

"IV. That the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

"If the Senate gives its assent upon this basis, steps can then be taken for the adhesion of the United States to the protocol in the manner authorized. The attitude of this Government will thus be defined and communicated to the other signatory Powers whose acquiescence in the stated conditions will be necessary."

This statement requires no interpretation. It frankly recognizes that the signature of the Protocol open to the United States is impossible without implying on the part of the United States some legal

relations and the assumption of some obligations to the League of Nations under the Covenant of the League constituting Part I of the Treaty of Versailles. It recognizes also that, without the permission stipulated in the second paragraph of these reservations, the United States would have no part in the election of judges or deputy-judges or the filling of vacancies.

Correspondence followed between President Harding, Senator Lodge, then Chairman of the Senate Committee on Foreign Relations, and Secretary Hughes,[5] regarding the intentions of the President as to compulsory jurisdiction, the recognition of Part XIII (on Labor) of the Treaty of Versailles, and what reservations, if any, have been made by those countries who have adhered to the Protocol. The answer given to this question is, that the Secretary of State is "not advised that any other State has made reservations on signing the Protocol." [6]

President Harding's message to the Senate produced at the time a variety of reflections. To many it was a friendly gesture to the League. To others it was a positive assurance of peace. To others it was an indirect step toward a World Court of Justice when it might have been bolder to take a direct

[5] *Congressional Record,* 67th Cong., 4th sess., Vol. 64, No. 80, p. 5135.

[6] The Harding-Hughes Reservations and the Correspondence may be found also in the *American Journal of International Law* for April, 1923.

step. To still others it seemed a retreat and a humiliation.

The subject had a political angle. For a time it looked as if the President's party might be divided. Had he not characterized the League of Nations as "a political and military alliance," with which the United States should not be in any way associated? And now he was proposing participation in a Court that was claimed as an "essential part of the League's organization."

President Harding was deeply moved by this division of opinion in his party. At St. Louis, on June 21, 1923, he laid down two conditions which he regarded as indispensable: (1) "that the tribunal be so constituted as to appear and to be, in theory and practice, in form and substance, beyond the shadow of a doubt, a World Court and not a League Court; (2) that the United States shall occupy a plane of perfect equality with every other Power."

"There admittedly is a League connection with the World Court," he said, and "though I firmly believe we could adhere to the Court Protocol, with becoming reservation, and be free from every possible obligation to the League, I would frankly prefer the Court's complete independence of the League."

Referring to the fact that the United States, voting for judges with the Council and the Assembly, as a candidate for adhesion admitted from the "An-

nex,"—a kind of half-way Covenanter—as the reservation proposed, might find its single voice overwhelmed and submerged by the united will of these bodies, acting not only as members of an electoral body but organically, with the interest of the League in view, President Harding, somewhat startled, said:

> "I am not wedded irrevocably to any particular method. . . . Granting the noteworthy excellence, of which I, for one, am fully convinced, of the court as now constituted, why not proceed in the belief that it may be made self-perpetuating? This could be done in one of two ways, (1) by empowering the court itself to fill any vacancy arising from the death of a member or retirement for whatever cause, without interposition from any other body; or (2) by continuing the existing authority of the Permanent Court of Arbitration to nominate and by transferring the power to elect from the council and assembly of the league to the remaining members of the court of justice." [7]

It was this suggestion, that the United States might possibly commit its rights and interests to the decisions of a self-perpetuating foreign tribunal, which more than anything else caused the country to realize with what slight consideration the gravity of the whole commitment had been weighed. The public interest in the proposal to adhere to the Court, even with "reservations," languished to a point where its advocates found it necessary to set in motion an ex-

[7] *American Journal of International Law*, July, 1923, p. 536.

tensive organized propaganda, similar to that which had been undertaken in behalf of the League of Nations, and nourished in large measure from the same sources.

The Total Separation of Court and League

The people of the United States had become familiar with the idea of "reservations" in the endeavors to render acceptable some mode of entrance into the League of Nations. The method had proved futile, but this was not its only ground of condemnation. To make reservations about entering a political and military alliance, was one thing; but to make reservations about participating in a legal tribunal of justice seemed quite another. The bare fact that "reservations" were admittedly necessary, gave rise to much hesitation. If there were dangers in adhering to the League's Court, why venture at all upon an enterprise that required great caution? Would the reservations be adequate for protecting the interests of the United States? But, adequate or inadequate, was it not a national humiliation and a reflection upon the character of a Court to approach it with open misgivings and distrust?

The Senate, being in doubt, permitted the Harding recommendation to repose in its archives. The Committee on Foreign Relations, although containing a

majority of members of the President's party, was absorbed by other matters. Letters and telegrams from various parts of the country, inspired by organized societies, urging the Senators to sign on the dotted line, became so numerous and so urgent that the lot of a Senator was felt to be unenviable.

Something must be done. Had not President Harding said, in so many words, "I would frankly prefer the Court's complete independence of the League"? Why not then propose such a total separation?

On December 10, 1923, Senator Lenroot offered in the Senate a resolution to this effect:

> "*Resolved,* That the Senate advises and consents to the adhesion on the part of the United States to the protocol of December 16, 1920, accepting the statute of the Permanent Court of International Justice, but not the optional clause for compulsory jurisdiction: *Provided, however,* that such adhesion shall be upon the following conditions and understandings, to be made a part of the instrument of adhesion:
>
> "1. That such adhesion shall not be taken to involve any legal relationship on the part of the United States to the League of Nations, or the assumption of any obligation by the United States under the covenant of the League of Nations, constituting a part of the Versailles treaty.
>
> "2. That such adhesion shall not take effect until the statute for the Permanent Court of International Justice is amended so as to provide—

"That all independent States having diplomatic representatives accredited to The Hague, which have not adhered to the Protocol of December 16, 1920, accepting the statute of the Permanent Court of International Justice, shall be permitted to so adhere.

"That in lieu of elections of said judges and deputy judges in the future by the council and assembly of the League of Nations, such elections shall take place in the following manner:

"The States adhering to such protocol shall be divided into two groups, the first group to be known as 'Group A' and to consist of the following States: The British Empire, France, the United States, Italy, Japan, Germany, and Brazil. All the States adhering to such protocol shall constitute the second group, to be known as 'Group B': *Provided,* That if Germany shall not have adhered to such protocol when the said statute shall have been amended as herein provided, Belgium shall be substituted therefor in Group A.

"The diplomatic representatives of the States adhering to said protocol, accredited to The Hague, and the Netherlands minister for foreign affairs shall act as electors for the election of judges and deputy judges of said court. The electors representing the States in Group A shall perform the duties and exercise the powers conferred upon the Council of the League of Nations pertaining to such court in such statute, and the electors representing the States in Group B shall perform the duties and exercise the powers conferred upon the assembly of the League of Nations pertaining to such court in such statute.

"That all notices of election and other duties now imposed upon the secretary general of the

League of Nations, pertaining to said court, shall be transferred to and performed by the registrar of the Permanent Court of International Justice.

"That the expenses of the court shall, instead of being paid by the League of Nations, be paid by the States adhering to the said protocol in such manner as may be determined by the electors of the States entitled to participate in the election of judges.

"That the court shall be open to all independent States, and when a State not adhering to said protocol is a party to the dispute the court will fix the amount which that party is to contribute to the expense of the court.

"That the option provided for in article 36, chapter 2, of said statute, shall be open to all States adhering to said protocol.

"3. That the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended except as herein provided without the consent of the United States.

"That the President of the United States, when he is satisfied that the said statute has been amended, as herein provided, shall, by proclamation, so declare, whereupon the adhesion of the United States to the said protocol shall become effective." [8]

The World Court Proposed by Senator Lodge

The proposal to separate the Permanent Court of International Justice entirely from the League of Nations having led to no action, and the propaganda

[8] *Congressional Record*, 68th Congress, First Session, Vol. 65, No. 5, p. 152.

for adherence to the League's Protocol still continuing, on May 5, 1924, Senator Lodge, Chairman of the Committee on Foreign Relations, presented to the Senate a "Plan by which the United States May Cooperate with other Nations to Achieve and Preserve the Peace of the World," prepared under his direction by an experienced American jurist, the Honorable Chandler P. Anderson.[9]

The purpose of this plan was set forth as follows:

> "The aim of this plan is the organization of the world for peace through the development and enforcement of law, as approved by past experience, and the timely submission of international disputes to the great court of public opinion, the decisions of which constitute the real sanction for the enforcement of law."

The entire substance of the plan may be most briefly stated in the form of the Conclusions with which the document closes, as follows:

> "1. The United States should resume its former position of leadership in the development of international law and the organization of the world for peace on the basis of respect for law and the jural equality of all nations.
>
> "2. To this end the United States should take appropriate steps for convening the third Hague peace conference:
>
> "(a) To reaffirm and further develop the

[9] Senate Document No. 107, 1924.

world organization for peace embodied in The Hague convention of 1907 for the pacific settlement of international disputes; and

"(b) To make more effective all the modes of procedure, therein provided, for the amicable adjustment of international disputes; and

"(c) To transform the present league court into a world court of justice as a part of The Hague peace organization; and

"(d) To formulate and agree upon further rules and principles of international law which should be embodied in the code of the law of nations; and especially

"(e) To define (1) justiciable questions which all nations should agree are subject to arbitration, and (2) unjustifiable wars and the legal restraints which should be imposed upon the sovereign right of a nation to declare war, the violation of which all nations should agree would constitute an international crime.

"3. Pending the meeting of another Hague conference, the United States should enter into preliminary agreements with the other great powers defining justiciable questions and unjustifiable wars and stigmatizing such wars as international crimes, and imposing the legal restraints above suggested upon the legality of war."

The Reorganization of the Court Proposed by Senator Pepper

No action having been taken in the Senate upon Senator Lodge's proposal for a World Court, on May 16, 1924 a resolution was presented to the

Senate from the Committee on Foreign Relations by Senator Pepper, of that Committee, for the remodelling of the Permanent Court of International Justice in such a manner as to convert it into a World Court without destroying its identity, and yet entirely separate the Court from the control of the League of Nations. The execution of this plan involved a rewriting of the Protocol and a thorough revision of the Statute of the Court, for which a form was definitely drawn up ready for immediate action, in which all the details of amendment were distinctly set forth.

In this new form of the Protocol, to be signed by all members, old and new, it was specified that:

"The present Protocol shall be deposited, after ratification, with the Secretary General of the Permanent Court of Arbitration at The Hague.

"The said Protocol shall remain open for signature by all nations generally recognized by treaty or diplomatic relations with the Signatories.

"The signature of the United States of America shall be understood to be affixed subject to the declaration that the United States disclaims all responsibility for the exercise by the Court of the jurisdiction to render advisory opinions, and subject to the further declaration that the United States intends to adhere to the Monroe Doctrine as a national policy and assumes no obligations inconsistent therewith.

"The adjoined statute shall come into force as an amendment of or substitute for the existing

statute as soon as all the Signatories of the Protocol of 16 December 1920 shall have deposited their assent thereto with the Secretary General of the Permanent Court of Arbitration at The Hague in a single copy, the French and English texts of which shall both be authentic.

"Third, That the adjoined statute referred to in the Protocol shall be the present statute of the Court amended in such a way as to confirm the existence and competency of the Permanent Court of International Justice but to disassociate it from the League of Nations and constitute it a World Court. The specific amendments to be assented to by the Signatories to the Protocol before the United States of America is authorized to become a Signatory are those set forth in the annex to this resolution which is incorporated herein and made a part hereof.

"Fourth, That the signature by the United States herein referred to is a signature to the Protocol as set forth in this resolution but not to the so-called optional clause referred to in Article 36, paragraph 2, of the Statute of the Court.

"Fifth, That the Senate advises the President that a Third International Conference similar to the Hague Conferences of 1899 and 1907 be called not later than the year 1926 for purposes which shall include the giving of effect to the recommendation of the Committee of Jurists upon the basis of whose report the Court was established, regarding the clarification and further development of international law, and the codification thereof."

This proposed reorganization of the existing Court was intended not to destroy the League's

Court, but to transform it in such a manner as to make it no longer the League's Court but in a true sense a World Court, in which all nations regarded as members of the society of civilized and responsible nations might have a part on terms of equality.

The Discouragement Following These Efforts

It was not without a certain feeling of discouragement that the friends of these last named efforts to reorganize the League's Court, so as to make it a veritable World Court of Justice, found their endeavors reproached with the accusation of a lack of sincerity. It was a cruel and wholly unjustified reproach.

But the attack on these efforts was something more and worse than individual reproach. The method of dragooning Senatorial action by public importunity and condemnation, if applied to the Executive and Judiciary departments of the Government, as in this case it was applied to a Legislative department, would result in the entire abolition of orderly constitutional procedure. To be in any sense responsible, the action of the Senate, and of individual Senators as well, must be free from every form of organized popular restraint. This is of the very essence of representative government.

There is clearly a wide difference between that

importunity which consists solely of mere mass influence on the one hand, and the presentation of reasoned argument for or against public policies on the other. It is the undoubted privilege of citizens and of the press to support or to criticize public measures, no matter who advocates or who opposes them; but this is a quite different procedure from urging upon elective officers the uninstructed preferences of portions of the public by the parade of formidable resolutions, alleged to have been passed by casual bodies that make no pretense to an exact knowledge of the subject under consideration.

There can, of course, be no doubt regarding the sincere intentions of many of those who have permitted themselves to participate in this urgent pressure for immediate action in a predetermined sense. They were no doubt deeply interested in the cause of peace. Quite naturally, they were anxious to have something done. But there was no occasion that anything should be done hastily. As we discovered in the prolonged discussion of the proposal to ratify the Treaty of Versailles, especially with regard to its first and its thirteenth parts, such occasions, if properly utilized, afford immense opportunities for public education in foreign affairs and the general comprehension of the import of public policies. But this implies that these policies should be freely discussed, from all points of view; and, in so far as

they are technical questions, that they should be discussed even from a technical point of view. There has never been anywhere a complete examination of this subject. The whole question, up to the present time, has received but little attention in the Senate and little detailed analysis in the press.

The Logic of the Situation

What then was the actual situation in January, 1926? The different proposals relating to a World Court of Justice were in substance:

I. The Harding-Hughes Reservations;
II. The Lodge World Court Plan; and
III. The Plan for Reorganizing the Permanent Court.

These all agree in one thing, namely, that the United States should not sign the Protocol of the Court of December 16, 1920, as it stands.

The first plan seems to imply that it should be signed only upon certain conditions and understandings called "reservations." The second and third plans oppose signing that particular protocol in any form.

Against signing it is the fact that, no matter what reservations are made, it is designed only for those nations that are members of the League or Signa-

tories of the Treaties of Peace mentioned in the Annex to the Covenant. The United States can not sign the Protocol as a member of the League, and to sign as "mentioned in the Annex," implies that the United States still has the relation of a half-way adherent to the Treaty of Peace which it did not ratify and quite certainly never will ratify.

What then remains? The Protocol of the League is the League's own Protocol, prepared as a supplement to the Treaty of Versailles and in particular to Article 14 of the Covenant. The United States, if it adheres to the Permanent Court of International Justice, should have the privilege not of participating in an act provided for by a treaty it has not ratified, but of adhering to a Court already in existence, made broad enough to include all sovereign States, as the signatory of a protocol in which the United States is an equal. It should sign with its peers as a peer.

As the members of the League have signed a protocol appropriate for them as members, the United States, if it adheres to the Court, ought to sign a protocol appropriate for it, as a non-member of the League—a protocol in which the League of Nations, as such, has no part. Its right to join with the present members of the Court as an adherent of the Statute of the Court, should not be derived from its repudiated signature to a treaty it did not ratify, that is, as a quasi member of the League,

but from the fact that a Court actually exists in which a great number of the civilized nations of the world are represented, and from which other sovereign States should not be excluded.

No one can sustain the thesis that this Court which these nations have established should be destroyed, or that members of the League of Nations should not be members of a World Court. The thesis that can be sustained is, that the United States can not, without compromising itself, join this Court while it is only the League's Court.

A Protocol of Peers

The reason for joining the Permanent Court of International Justice should not be that the United States and other nations signed together a treaty that has not been ratified by the United States and certain other nations, but that the United States and certain other nations are independent sovereign States. The Protocol of December 16, 1920 was signed by members of the League of Nations because they were members of that League. It was sufficient to constitute a League Court, but it is not sufficient to constitute a World Court. There can probably be no other international court of which the States signing that protocol will become members. It is necessary, therefore, if there is to be a World Court, to deal with these States. But they should be dealt

with, not as members of the League of Nations, but as separate sovereign States. It is idle to think of breaking up their constructive work. What is needed is to enlarge and develop it. For this all responsible sovereign States are necessary. There should be therefore a protocol which all responsible sovereign States can sign with equal privileges. Such a protocol should contain the following agreements, to which the signers of the existing Protocol should consent by signing with the United States and other nations:

(1) That all sovereign States may be admitted on equal terms without reference to whether they have or have not either signed or ratified the Treaty of Versailles;

(2) That States thus adhering to the existing Statute of the Court should have equal representation in the Electoral Bodies named in Articles 3, 4, 5, 8, 10, 12 and 32 of the Statute of the Court, without implying any legal relation or obligation to these bodies other than those prescribed for them in the Statute of the Court as co-equal for the purposes of the Court.

(3) That changes shall not be made in the Statute of the Court without the consent of the adherents.

(4) That the charges of maintenance of the Court shall not be different for the adherents from those borne by the signatories of the Protocol of December 16, 1920.

(5) That the decisions of the Court do not bind any States except the actual litigants, and the opinions of the Court bind no one.

(6) That the Signatories of the Protocol do not oppose the convocation of future Conferences at The Hague for the revision and amelioration of International Law, the engagements of which do not become binding upon any State until it has itself ratified them.

Such a Protocol, open to all adherents, would preserve the rights of all. It would include the formal consent and agreement of the signatories of the Protocol of December 16, 1920, on the one hand; and, on the other, the acceptance of the jurisdiction of the Court, in accordance with the terms and subject to the conditions of the Statute of the Court, by the adherents to the Statute, with all the rights, powers, privileges and immunities of the signatories of the Protocol of December 16, 1920. Such a Protocol would constitute a real World Court. Although all the members of the League of Nations would be, or might become, participants in the Court, it could no longer be reproached with being merely the League's Court.

No Half-way Covenant

While signature of the Protocol of December 16, 1920, is impossible for the United States, without

reservations which would take back with one hand what was granted by the other, and imply that this engagement was open to it only as a half-way Covenanter, who had signed the Treaty of Versailles but had refused to ratify it, the signature of a Protocol in which the existing Court would be opened to sovereign States without this embarrassment, would secure without reservations, and with the formal consent and agreement of the present members of the Court, a perfect equality and a wholly adequate safeguard.

The Statute of the Court has never been the object of criticism in this country, as a structure of jurisprudence, except from the fact that it was originally created as a closed and impenetrable organization under the name of a Court of Justice. Those who have created it have the unquestioned right to open it to adherents by the broader construction they might place upon its provisions.[10]

A simple resolution of the Senate declaring its disposition to ratify a new protocol, to be signed by the Signatories of the Protocol of December 16, 1920, and future adherents to the Statute of the Permanent Court of International Justice, would have solved the problem as to whether or not the present tribunal could be transformed into a real World Court.

[10] See Satow's *Diplomatic Practice,* Vol. II, p. 239, for a similar explanatory protocol.

Would such a proposal have been accepted, or rejected?

The reply would at least have settled the question whether the signatories of the Protocol of December 16, 1920, really mean to make the Permanent Court of International Justice a mere organ of the League of Nations, or a true World Court.

CHAPTER III

How the Senate Tried to Help out the Proposal to Adhere to the League's Court

ON the twenty-seventh of January, 1926, the Senate of the United States, by a more than two-thirds vote, gave its consent, but hardly its advice, to the signing of the Protocol of Signature accepting the jurisdiction of the Permanent Court of International Justice of the League of Nations. This result of an ardent aggressive campaign by the friends of the League, predicted and promised as a political concession to their insistence, has not been acclaimed with the signs of rejoicing that were expected. It is quite apparent that it was nobody's victory, even if it may be regarded as somebody's defeat.

It was still too early to foretell the consequences of signing an agreement that had never been negotiated or of applying the Statute of a Court which had never been discussed. At most, the consent given was conditional, and it remained to be seen how the conditions would be received by the League; for the

League was yet to speak, and in any case we should have to wait to see how the machinery of the Court would operate with this new piece added to its structure.

Writing in April, 1926, after the teasing and menacing of the Senate by the friends of the League had been suspended and the flood of letters and telegrams urging the Court had ceased to flow, there persistently recurred to me the well-known verse:

"Mother may I go out to swim?"
"Yes my darling daughter;
Hang your clothes on a hickory limb,
But don't go near the water."

This paradox of nonsensical verse, which presents the picture of a distraught mother, solicitous for the safety of an adventurous daughter, whose welfare she desires to protect, but whose sudden impulse she has not the courage to restrain, appeared to me to typify the attitude of the Senate, which could not refuse, and yet did not in reality approve, the enterprise of knocking at the door of the League of Nations for admission to the alleged World Court. In an article on "The Gentle Art of Learning to Swim Without Going Near the Water," I ventured to point out in the "advice and consent" of the Senate of the United States a parallel to the protective function of maternity.

The Senate as an Institution of Government

By a happy constitutional device a prudent restraint of impulses to embark upon dangerous adventures has been provided in the Nation for the safety of the people in the form of an advisory agent not dissimilar to that furnished by nature for the safety of the young through the protective instinct of motherhood.

In the family, even in the sub-human stages of development, restraint is necessary to the safety of immature life. Maternal regard for the well-being of her offspring inclines the mother to protect them from harm. In time the young acquire the habits of self-conservation, and in their turn transmit them to the next generation. This is one of those providential arrangements without which life on this planet would long ago have become extinct.

In like manner, in the organization of the political institutions peculiar to the United States of America, prudence seemed to demand that the sudden and sometimes unreasoning impulses of popular emotion, not infrequently inspired or promoted by private or local interests, should somewhere meet with a restraining influence, which would not rudely and arbitrarily forbid the dangerous experiment, but would gently arrest impetuosity and through deeper reflection and wider experience wisely guide the adventurous spirit into a mood of reason and deliberation.

Such a counsellor, it was thought, could be found in the Senate, a comparatively small body, originally composed of wise and experienced men representing all the constituent States of the Union, and therefore expressing a widely diffused and well balanced public sentiment, in which all interests and all opinions would have deliberate and untrammeled opportunity for expression. To serve this purpose, this body was made to voice the sentiments of the States rather than that of the individual citizens; was charged with preserving to each State its due prerogatives of original sovereignty; and was exempted from every influence external to itself which might thwart its deliberate discussions and decisions. It was not to be hurried, intimidated or robbed of its efficiency in performing its legitimate office by partisan pressure, abuse or disrespect.

In order that it might be qualified to perform its part as an adviser, the tenure of office of its members was made longer than that of the President. As a body it could not be entirely changed at one time, and was never to lose at a given moment more than one-third of its membership. The same person could be elected for any number of successive terms, so that the same individual could acquire experience and exert influence in this body for a quarter of a century, or even longer, as has often proved to be the case; thus making the Senate the only depository of

continuity in our system of Government. Presidents may come and Presidents may go, some with much experience and some with little, swept into office and swept out again by the periodic tides of public opinion; but the Senate—ah! the Senate, that was to be the permanent organized wisdom of the Nation, the rock of Gibraltar for the safety of the people!

The Responsibility of the Senate

It is no part of the present writer's purpose to offer here a disquisition on the functions of the Senate of the United States, or to estimate either its present character or the manner in which it has fulfilled the offices for which it was designed.

Although, without doubt, the idiosyncrasies of individual Senators may sometimes make the Senate eligible to caricature, it is far from the purpose of this paper to subject it to so rude an ordeal. On the contrary, it is more important that we should be reminded that, next to the Presidency, which we all hold in honor, the Senate is charged with the heaviest responsibility for the safety and welfare of the Nation. It requires but a momentary comparison of the departments of Government to make it clear that this is true. As compared with the House of Representatives, with which it is in some respects co-ordinate, it is not only charged specifically with

the most delicate duties, but the tenure of its members is three times as long as that of members of the House. As compared with the Judiciary, the judicial function is confined to the declaration of a law already defined for it in the Constitution and the legislative acts, while the Senate is designed to be a deliberative body, with perfect freedom of discussion and expression of opinion upon all the open questions that confront the Nation.

The most distinctive feature of the Senate, as distinguished from the other branches of the Federal Government, is its responsibility respecting Foreign Relations. Here at least the founders of our system of Government felt the need of an advisory body, without whose consent no engagements with foreign nations would have validity.

The reason for this restraint upon the Executive should not be overlooked. It was clearly pointed out by Alexander Hamilton in *The Federalist:*

> "However proper and safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years' duration. . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole dis-

posal of a magistrate created and circumstanced as would be the President of the United States.

"To have entrusted the power of making treaties to the Senate alone," he continues, "would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. . . . Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation would materially add to the safety of the society. It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them."

The truth of this statement by Hamilton is obvious. If the Senate alone were to determine policy, it could be objected that, although the Senate, as a whole, might represent better than the President the continuity of foreign policy, it would not perhaps possess such full information regarding an existing situation; since the President's Secretary of State is in direct personal contact with the entire world through the diplomatic officers of the United States. On the other hand, for this very reason, the President would be more exposed to personal influence, both foreign and domestic, since he is of necessity in direct contact with his own agents and personal advisers and ambassadors accredited to him who regard him as the one officer of Government most readily acted upon, and sometimes privately, for the reason

that he alone possesses the power of initiative in effecting a change of policy.

The Diversity of National Interests

There is still another reason why the Senate has been made and should continue to be an advisory body in the conduct of Foreign Relations. Our Constitution is the organic law of a Union of States. The interests and responsibilities of the States are far from identical. Engagements made with foreign governments may be very advantageous to certain States but very disadvantageous to others. With the constant development of the problems of commerce, finance, immigration and political alliances, the diversity of these interests has been and will be greatly augmented and intensified. This diversity affects not only States of the Union but large and important classes of individual citizens. Lenders and borrowers of money, producers and consumers of manufactured articles, employers and the employed are all affected by the arrangements and engagements made by the Government of the United States with foreign nations and the laws relating to them.

To illustrate this divergence of interest in the different States, let us take as an example international finance. In the year 1924 there was exported from the United States to foreign countries movable capi-

tal to the amount of $1,053,500,000, and in 1925, $3,139,833,000.[1]

These billions of the surplus wealth of the United States were sent abroad for personal profit in the form of a higher interest rate receiving nearly twice the return that would have been received if loaned in the United States to cities, towns and private corporations for the improvement of this country.

Does anyone imagine that this exportation of capital is looked upon with the same approval, and that there is the same interest in the security of these investments, in all the sections and all the classes of people in the United States? Has anyone been led to believe that the Permanent Court of International Justice affords any security to these loans? Does anyone have reason to suppose that if the United States adheres to this Court there is tc be a reign of law and an end of war? Is it believable that if the Government of the United States should wish to render itself responsible to the slightest extent for the repayment of these loans, that there would be no division of opinion on the subject?

Nearly all the strong movements for change in foreign policy emanate from some locality and are supported by private interests. Is it not just and expedient that East and West, North and South,

[1] *World Almanac* for 1925 and 1926.

representing divergent interests, should somewhere have a voice, sometimes of inquiry and sometimes of protest, raised in their behalf? And where else can this be done, if not in the Senate of the United States?

What reasonable man can object that documents too much neglected should be examined, that possible dangers of commitment to hastily prepared schemes of action should be exposed if they exist, and considered as possible consequences even if they do not exist? What outside influence, under whatever name, is to be allowed to penetrate into our domestic concerns, to deflect or manipulate them? Who will have the hardihood to maintain that the defensive and precautionary authority of the Senate should be silenced by popular uproar? There was a time when the Senate of Rome was the balance wheel of power in the Republic. A power external to itself transformed the Republic into an Empire, and Caligula made his horse a Consul.

The Common Denominator of National Interests

There has been in the United States upon several occasions a strong effort to induce the Federal Government to associate itself with foreign nations in various ways, sometimes in the name of peace, sometimes in the name of justice, and sometimes in the

name of human fraternity. What is the driving force of these efforts? In choosing for illustration international finance, there has been no intention to stress any of the particular interests involved in it, or to emphasize the distinction between the interests affected. The tariff, the question of immigration, and many other questions of conflicting interests would serve as well to illustrate the point, which is that these interests are divergent, and therefore that they are matters in which the Senate must necessarily participate. Every such question touching upon foreign policy has its local origin and its local effects. Senators were originally regarded as the ambassadors of the several States. Their normal function grows out of this representative character. They are the guardians of the public safety. It is for this reason that their advice and consent in matters affecting the whole Nation is authorized, for without it there would never have been a Union of the States. In addition, it is provided, in the interest of all, that these rights and interests of the States are not to be forfeited by the will of a numerical majority. All the great sanctions of the Senate in the sphere of foreign policy require the assent of a preponderant consensus of advice by a two-thirds vote.

It has seemed necessary to recall to attention the function of the United States Senate as a preliminary to the consideration of its recent action with regard

to the Permanent Court of International Justice. The Senate as a body has been much abused because it has not promptly yielded to the importunity of those who have desired of it action which they wished to impose upon it by an expression of their private and irresponsible wills.

There is in the preceding paragraphs no purpose to convict anybody of wrong, but it is a bad sign for any citizen to attack the fundamental integrity of our political institutions by an assault upon the motives of one of the great organs of Government.

The Senate is one of the most important of these and, next to the Supreme Court, the most original of our American political institutions. Without it there could never have been a Union of the States. It is the organ that at the same time marks their separate entity and their national community.

Each one of the States possesses a certain fraction of the national strength and the national will. These fractions differ widely in their value both from the point of view of power and the point of view of interest. The Senate is their common denominator. It, and it alone, can give these fractions unity of expression. This the President can not do. He is the leader of a party; always has been, and always will be. His office is a great one. In it only his party, not the whole Government, is on trial. In the Senate the whole Government is on trial. If

the Senate fails, the whole system fails. Why? Because our Republic is a Union of States. Parties may fail, but they succeed one another; and when one causes damage the other may repair it. But if the Senate fails, then the Republic gives way to chaos; the balance of the Union of States is destroyed; some interests become permanent victors, others the permanently vanquished.

American Ideals and Traditions

It has rarely happened in the political history of the United States that any great movement has been set on foot without an appeal to some altruistic human motive. Somebody's wrongs or sufferings, it is represented, are to be assuaged. It is a matter of national pride that it is so. If there are three human motives to which the American people love to pay tribute, they are peace, justice and the alleviation of suffering. It is behind these motives that every proposal of change delights to array itself. The cruelty of slavery, the political disabilities of women, the horrors of war may serve as examples. One other significant human motive is particularly characteristic of the American spirit,—the abiding fear of subjection to some form of arbitrary power.

It is no sign of indifference to these aspirations for peace, justice, humanity and independence to in-

sist upon open-mindedness in studying the manner in which they should be realized and applied. Nor is it forbidden to examine whether or not there are any political passions, prejudices or fanaticisms masked behind them. Where large sums of money are expended to influence governmental action, it is not unatural to look for special motives; but there is in this fact itself no necessary ground for condemnation of a movement to form and enlighten public opinion.

The aspect of the subject which demands examination is to discover whether or not such a movement is really open-minded, based upon knowledge, and seeking to establish the whole truth in the faith that the whole truth, when made known, will inevitably lead to the end commended.

It is in this connection that the movement to secure the entrance of the United States into the League of Nations, and afterward into the League's Permanent Court of International Justice is subject to some kindly criticism.

Consciously or unconsciously, there has been a manifest tendency to play the part of an urgent advocate, and not to invoke the judicial attitude in treating the subject. It has always been assumed, and even openly avowed, by their American supporters that the Covenant of the League of Nations and the Permanent Court of International Justice

are the ripe fruition of American efforts and traditions and for this reason they should be accepted as they are; and it has not been pointed out or admitted by them in what respects the League and the Court are not only not embodiments of American ideas but contraventions of them.

It is not here contended that any realizable international system could be a complete and immediate embodiment of American ideas. That, of course, is impossible; for the reason that such a result could be obtained only by a general agreement. What is here maintained is that both in the League and in the League's Court American ideas and traditions have been frustrated and virtually abandoned.

The Decision Regarding the League of Nations

It is not perhaps inappropriate at the present time to bring to remembrance some of the events and conclusions of recent years.

It will be recalled that when, in 1919, the Senate of the United States was invited to ratify the Treaty of Peace made at Paris and signed at Versailles, the whole country was at the moment favorable to ratification. The reason was obvious. The people were told, and they believed, that this treaty, and particularly its First Part, the Covenant of the League of Nations, was an instrument which would secure peace

and justice for the whole world. The announcement was highly gratifying. It appeared as if the millennium might be near at hand.

When, however, it was demonstrated in the Senate, and elsewhere, that the Covenant of the League of Nations did not lay its principal stress upon a judicial organization but upon the combined powers of a Confederation of States; that it was, as President Harding did not hesitate to call it, "a political and military alliance," a device of the Great Powers to secure the execution of the Treaty of Versailles, and to impose upon Europe a map created by war and not by agreement of the peoples concerned, a profound change took possession of public opinion. The Senate bravely refused to assume for the United States the obligations contained in this alleged Covenant for peace and justice. It was soon discerned that war was embodied in this compact as a contingent obligation. President Wilson insisted that Article 10 was "the heart of the Covenant," and refused to have it eliminated or modified by reservations on the part of the United States. The Senate declined to ratify the treaty which contained the Covenant, and the refusal was confirmed by the "referendum" demanded and accorded at the polls.

It has been said repeatedly that the decision then made was not definitive. In a sense nothing human is definitive; but it has never been pretended that the

Treaty of Versailles, and especially the Covenant of the League of Nations, will ever be ratified by the Senate of the United States as it was presented and insisted upon by the President at the time when ratification was refused.

Without dwelling upon a past too recent to require to be recalled in its details, it appears incontestible that the Senate of the United States refused its advice and consent to the entrance of the United States into the League of Nations, because the Covenant was designed as an instrument of power rather than an instrument of justice. That such a Confederation of States as the Covenant has organized may be useful to the preservation of peace in Europe may be freely granted, and is not likely to be generally disputed; but clearly it was not in the line of the traditions of American foreign policy to assume the obligations of this Covenant.

The Connection of the League's Court with the League

When, however, the idea of a Permanent Court of International Justice began to be developed in the League, American interest was renewed. That was not only in line with American policy but it was an object for which the American Government, with the virtually unanimous assent of the American

people, has long and consistently labored. It is not strange, therefore, that considerable enthusiasm for the Court was awakened in the United States, and it is still less strange that the proponents of entrance into the League saw an opportunity to encourage the idea of at least entering into the League's Court.

Entrance had been rendered easy by the fact that, while membership in the Court, according to all the documents relating to its genesis, required a preliminary entrance into the League on the part of all its actual members, the signature of the Treaty of Versailles by the United States left a door open to the United States to sign the "Protocol of Signature" by which the Statute of the Court as developed by the League was finally adopted. States whose representatives had signed the Treaty of Peace had been listed in the "Annex" to the treaty as "Original Members of the League of Nations." For this reason the United States had only to sign this "Protocol of Signature" in order to participate in accepting the work of the body that had created the Court.

By this signature the United States would ratify at least one article of the Treaty of Versailles, which it had declined to ratify, namely, Article 14 of the Covenant of the League of Nations, constituting Part I of the treaty, which provided for the formation of this Court. It need not be added that this signature would mean acceptance and approbation

by the United States of every step taken by the League of Nations in executing this article of the treaty.

In order to secure this result, it was represented in the United States that this "Protocol of Signature" is an "independent treaty signed by various nations"; which gave the impression that the Permanent Court of International Justice is in reality a World Court, and not exclusively the League's Court. An examination of this "Protocol of Signature" would have shown on the face of it that this Court is what the *Official Journal* declares it to be, "an essential part of the League's organization," created by and for the League alone, with no provision in the Statute of the Court for either the nomination or the election of judges by any State not an active or an "original" member of the League. Quite naturally the text of the "Protocol of Signature" was not given wide publicity by those who desired the signature of the United States, and it was virtually unknown, even by Senators, until near the close of the recent debate in the Senate.

It is deserving of notice that the protagonists of this Permanent Court of International Justice were strongly averse to permitting it to be called "the League's Court," and insisted upon its being called "the World Court."

The debate in the Senate has shown beyond the

possibility of denial that this Court is the League's Court and nothing more. It is the League's Court because it was created by the League alone, in execution of Article 14 of the Covenant. It is the League's Court because the Statute of the League was prepared for the League with the idea that only members of the League would ever be members of this Court. It was expressly provided by Article 37 of the Statute of the Court whose jurisdiction the United States is urged to accept that "when a treaty or convention provides for the reference of a matter to a tribunal to be established by the League of Nations, the Court will be such tribunal."

If the achievement of this Court has been accomplished by the League, and by the League alone, why should anyone maintain that it is not the League's Court? Should it not be to the glory of the League, if this is really the League's Court? Why then should the fact ever be denied by its friends?

The Hall-Marks of the League in the Statute of the Court

The answer is obvious. The creation of the Court by the League and by the League alone was recognized to be a cause of prejudice against this Court and of an apprehension of entanglement with the League if the United States should enter into it.

Is there any foundation for this apprehension?

It is desirable to be perfectly clear on this point. Objection to entering the League's Court is not that it was created by the nations that are members of the League. There can never be a real World Court without the participation of these members in it. They constitute a great majority of the Sovereign States of the world. Their union is an achievement not to be despised or to be lightly considered. They have created a Permanent International Court. It may in fact prove too permanent, too stationary, too much the organ for maintaining a fixed international system, a system produced by war and appealing to military force for the preservation of peace.

What then is the underlying ground of objection to participating in this Court of the League? It is that the hall-marks of the League are written more than sixty times into the very fabric of the Statute of the Court, and for this reason so long as it remains unsatisfactory to join the League it will be undesirable for this nation to be identified with or in any way held responsible for the action of this Court.

Wherein do the vices of the League affect the character of the Court? At every vital point,—its jurisdiction, its law and its political function. The primary root of these vices is Article 14 of the Covenant of the League, which repudiates the traditional American ideas of what a court of justice

should be, as declared and contended for by one of our greatest jurists, the Honorable Elihu Root, in his Instructions to the Hague Conference and as a member of the Commission of Jurists invited to prepare the Project of a Statute for the Court.

What are those precious traditional ideas?

(1) That even Sovereign States should not decline to accept the jurisdiction of a Court with respect to really justiciable cases;

(2) That really justiciable cases are such as are definitely covered by some law or convention previously agreed upon; and

(3) That the decisions of a Court not founded upon some previously accepted law or convention are likely to be arbitrary or unacceptable.

If now we turn to Article 14 of the Covenant of the League, we find that each one of these principles is either ignored or contravened in this article. This article provides that the Council of the League shall "formulate and submit to members of the League" (no State not a member of the League is mentioned) "for adoption plans for the establishment of a Permanent Court of International Justice." It is "the members of the League," as the "Protocol of Signature" repeats, by which these plans, when matured by the Council and the Assembly, are to be "adopted," thus prescribing the execution of this article of the Treaty of Versailles.

A comparison of the Project prepared by the Commission of Jurists with the Statute "adopted" by the "Protocol of Signature," shows that the jurisdiction of the Court in all justiciable cases, prescribed in the Project, is repudiated, because Article 14 has carefully confined the jurisdiction of the Court to "any dispute of an international character which the parties thereto submit to it." That is, no wrong-doer, however grave or however trivial the offense may be, can be brought before this Court without his own agreement to submit the case! Of what utility for justice is a court *wholly* without compulsory jurisdiction.

But, while no wronged nation can appeal to this Court for redress of a wrong without both parties previously agreeing to submit the case, Article 14 runs on, "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly." "Also!" Having no power to do anything of itself, it may "also" give a quasi-judicial approval to what the Council or the Assembly wishes to do or cause to be done!

Finally, next to the exclusion of States not in some way connected with the Treaties of Peace from participation in the League's Court without becoming members of the League, thus creating a monopoly of international control, was the refusal to accept the proposal for future general conferences for the re-

vision, clarification and extension of international law, so essential to any real advance of international justice. The reason for this, as seen by reference to Article 20 of the Covenant, is the abrogation of "all obligations or understandings *inter se* which are inconsistent with the terms thereof," and the solemn undertaking of the members of the League that "they will not hereafter enter into any engagements inconsistent with the terms thereof."

An Obscurantist Propaganda

Just as the League set itself against future general agreements with regard to the further development of law, the advocates of the League's Court set themselves against any relaxation of the League's control by an extension of the Court's membership beyond the Annex. For them the League and its Court became the end of the law.

Much has been written regarding the codification of international law and much also about the law being made by the decisions of the Court, as if all that remains to be done is to codify the international customs and precedents of the past and allow the Court in the dim light of such a code to determine the law for the future.

There could hardly be a more effectual method of sterilizing international justice than to consecrate past custom and leave further development to the

decisions of a Court endowed with the sovereign power of making the law. Such a proposal overlooks the fact that all modern law is developed by the agreement of those who are to be governed by it, and not a rule of action to be imposed by a superior. This at least is the American idea of law, and it is this idea which looks toward conferences of jurists to propose improvements in international law and the adoption of such improvements as are found desirable by the legislative bodies in the form of law-making conventions.

With regard to all these vital matters, the propaganda for entrance into the League's Court has been animated by obscurantism. By this is meant the urgency of will and determination toward an end thought to be desirable without any study of the ways and processes by which the ultimate end may be practically reached. It is the method of the promoter, but not the method of the statesman.

The result of this method is that great numbers of persons, without the examination of documents and the facts contained in them have been wrought upon to a point where will has displaced reason to such a degree that they, without discussion and examination, have demanded action, prompt action, and predetermined action by a body essentially deliberative, but of whose deliberations this irresponsible urgency is impatient.

The political influence of this urgency has been as effective as it was intended to be. It did not require any interest in this Court, or in any court, to realize that the League's Court had become a political issue. It could not be ignored. If there were developed a popular passion for constructing a mechanism at government expense to put us in communication with the inhabitants of Mars, when it became of interest to a sufficient number of voters it would become a political issue, and a promise of action upon it would be found in some political platform. Not to perceive this would indicate a total disregard of what political platforms are for.

Accordingly, in 1924, both political parties declared themselves for the "World Court." The Republican Platform read:

> "The Republican Party reaffirms its stand for agreement among the nations to prevent war and preserve peace. As an important step in this direction we indorse the Permanent Court of International Justice and favor the adherence of the United States to this tribunal as recommended by President Coolidge. This Government has definitely refused membership in the League of Nations and to assume any obligations under the Covenant of the League. On this we stand."

"On this we stand,"—"adherence of the United States to the Permanent Court of International Justice as recommended by President Coolidge" and the

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definite refusal of membership in the League of Nations and "to assume any obligations under the Covenant of the League." It was left to the faithful of the party to find a method by which this feat of standing on both adherence and refusal could be achieved. Difficult as it was, it appears to have been accomplished.

The Storm Centre in the Senate Debate

All those who have followed the entire discussion of this subject in the Senate are aware that the storm centre of the debate was how much risk of assuming obligations under the Covenant of the League is involved in adhering to the Court by signing the "Protocol of Signature." The number of persons who are aware of this is perhaps not large, for not many Senators heard the whole debate. In the midst of almost every speech the *Congressional Record* registers the formula—"I suggest the absence of a quorum," uttered once when six Senators were present, and the press reported the speeches only in a fragmentary manner.

It remains true that the main point of contention was how far signature of the Protocol of December 16, 1920, prepared when it was expected that the United States would eventually become a member of the League of Nations, but which after five years

remained unsigned, would involve the United States in obligations under the Covenant of the League. If none were involved, why might it not have been signed during these years that had passed?

One thing is clear, that the signature of this Protocol is a ratification of all that had been accomplished by the League in execution of Article 14 of Part I of the Treaty of Versailles, which the United States had declined to ratify.

It was perhaps for this reason, with others, that the Senate was asked to adhere to the Statute of the Court with four "reservations." This the Senate had not been inclined to do; but, on the contrary, the Committee on Foreign Relations had proposed to adhere to the Statute of the Court if the Court were wholly separated from the League and made a real World Court. Failing in that, the Senate had done nothing.

In the meantime, the personnel of the Committee on Foreign Relations had been extensively changed by death and other causes. Not only this, but a new reservation regarding advisory opinions had been added to the four.

Thus amended, Senator Swanson revived his resolution to sign the Protocol. It was predicted that enough Senators had decided to adopt this resolution to carry it by a three-fourths vote by virtually all of the Democrats, and nearly all the Republicans.

With a solution thus predetermined, there was but little interest in the debate in the Senate. Both parties had taken their "stand." On the one hand, there were to be no obligations under the Covenant; on the other, it was a recognition of the Covenant that was aimed at, with an adherence to Article 14 now, and to the whole of the Covenant at some future time, and this hope was freely expressed by Senator Swanson, who had presented the resolution, and by others.

Undoubtedly, the facts brought out in the debate and the news of how the country was taking it were creating some embarrassment for certain Senators. New reservations began to be framed. A certain agitation was evident. It would be better to close this debate. Other matters of greater importance to the people were pressing. But it was easier to start this discussion than to close it, and especially to close it with more arguments to be heard and a fuller understanding of those that had been presented.

And so, it was decided by the proponents of the resolution to sign the "Protocol of Signature" before a substitute Protocol of Adhesion, demanding as a preliminary to signature the real attitude of the previous signers regarding certain matters and an agreed statement by all the adherents of the Statute as to its scope and construction, could get under way.

The Resolution Adopted by the Senate

"If 'twere done, when 'tis done, then 'twere well it were done quickly," was the watchword; and this is what was done. By a vote of 76 to 17, the following resolution was adopted:

Whereas, the President, under date of Feb. 24, 1923, transmitted a message to the Senate, accompanied by a letter from the Secretary of State, dated Feb. 17, 1923, asking the favorable advice and consent of the Senate to the adherence on the part of the United States to the protocol of Dec. 16, 1920, of signature of the statute for the Permanent Court of International Justice, set out in the said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adherence. Therefore, be it

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the adherence on the part of the United States to the said protocol of Dec. 16, 1920, and the adjoined statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said statute), and that the signature of the United States be affixed to the said protocol, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations, or the assumption of any obligations by the United States under the Treaty of Versailles.

2. That the United States shall be permitted to participate, through representatives designated for the purpose and upon an equality with the other State members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of Judges or Deputy Judges of the Permanent Court of International Justice, or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses of the court, as determined and appropriated from time to time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said protocol, and that the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

5. That the Court shall not render any advisory opinion, except publicly after due notice to all States adhering to the Court and to all interested States, and after public hearing given to any State concerned; nor shall it without the consent of the United States entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

The signature of the United States to the said protocol shall not be affixed until the powers signa-

tory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said protocol.

Resolved, further, as a part of this act of ratification, That the United States approve the protocol and statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other State or States can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and,

Resolved, further, That adherence to the said protocol and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall adherence to the said protocol and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

The Resulting Situation

The full text of the resolution has been given because its "conditions and understandings" constitute an ultimatum. It was the most complete "consent" the Senate was disposed to give, but if the "reservations" are meant as "advice," much advice was also implied.

It is unnecessary to comment in detail upon the significance of this resolution. It appears to end the matter, for the present at least, so far as the Senate is concerned. It shows clearly where the Senate stands. It distrusts the League as a Confederation of States founded on power rather than on law. It will have to do with the Court as little as possible, and it will see that that little has the supervision and further "consent" of the Senate as a condition of appeal to the Court.

To some who have labored long for a real World Court, a court where justiciable cases may be brought by the wronged without the acquiescence of the wrong-doer, the result is a disappointment.

But, as has been said, it is nobody's victory. It is the proposal of a passage from the Annex of the Treaty of Versailles to a blind alley. The United States was, as a fact, no longer in the Annex of a treaty which it had abandoned. The admission that it was by construction still in the Annex keeps it on the waiting list for entrance into the League of Nations by one more signature. If signing becomes a habit, perhaps the Republican party will not "stand" in 1928 where it said it stood in 1924. It is well to keep faith, but it is wise to put it in the right place.

The wisdom of the Senate is not be decried. It has committed the country to nothing of importance.

As this writer takes his meditative walks under

the leafless trees and watches the little river rolling at his feet, he will often hear the refrain—

"Mother, may I go out to swim?"
"Yes, my darling daughter;
Hang your clothes on a hickory limb,
But don't go near the water!"

CHAPTER IV

The Situation after the Great Assize at Geneva

THE attitude of the members of the League of Nations regarding the admission of outsiders to a place in the Permanent Court of International Justice has at length been officially declared. In the United States it was represented during the discussion of proposed adherence to this Court that this tribunal is in no sense the League's Court, but a Court freely and independently created by "various nations" who had signed the Protocol of Signature. All the antecedent procedure by the Council and the Assembly of the League in creating the Court, it was seriously contended, should therefore count for nothing. This tribunal had been constituted as a real World Court, wholly independent of the League of Nations and entirely detached from the obligations of its Covenant.

The fact that the judges of this Court are by the Statute elected solely by the Council and Assembly of the League and receive their salaries from its

treasury was brushed aside as "merely incidental." Once created and set in motion, the Court, it was alleged, had no further relation to the League. It was a reflection upon its juridical quality to intimate, and a scandal to declare, that the Permanent Court of International Justice is "the League's Court"!

The Theory of the Court's Advocates

This Court being thus an independent tribunal, and in no sense the League's Court, it was thought proper for the United States to adhere to the Protocol that created this Court, just as it would adhere to any independent treaty negotiated between those who signed it. To indicate that this step was not in any way to associate the United States with the League of Nations, it was only necessary, it was held, to declare in the proposal of adherence that signature of the Protocol implied no obligations to the League or to its Covenant.

To some minds it appeared that to become a participant in an "essential organ of the League," as the Court was officially declared to be, was in effect to become in some way subsidiary to the League; on the principle that to become a part of a part was to become a part of the whole. Elaborate proof was offered to show that the detachment of the Court from the League was complete, in as much as not all

the members of the League had signed the Protocol creating the Court. The League and the adherents to the Protocol were, therefore, two separate bodies. Only those States who had signed the Protocol had anything to say about admission to the Court.

Without actual facts upon which to rest a judgment, it was impossible conclusively to answer this theory of separateness and detachment. Was it not possible that here was a wheel within a wheel that revolved on its own motion? Only time could tell. Now time has told.

The Appeal to the Individual States

Accepting the theory outlined in the previous paragraph, the Senate of the United States, after a debate that was prematurely hastened to a conclusion, on January 27, 1926, passed a resolution authorizing upon certain conditions the signature of the Protocol which had established the Permanent Court.

This resolution had been framed in such a manner as to make it plain that, if the Court was in any real sense the League's Court, the authorization of adherence was not intended to be accorded. Five reservations were incorporated in the resolution defining the "conditions" upon which signature was authorized, in the faith that they would afford complete security from all complications with the League of Nations.

As required by its terms, this resolution of the Senate was sent by the Secretary of State directly to each one of the signatories of the Protocol, with a request for a direct reply. The replies were expected to be in hand in the course of a few weeks, upon the assumption that each government addressed knew its own mind, and would promptly act upon its own decision, by either accepting or declining to accept the proposal of a conditional adherence to the Protocol.

It was proper that the separate States signatory to the Protocol should take into consideration the nature and effect of the reservations in so far as these affected their own status in the Court; but, upon the theory of the Court's total independence of the League, there was clearly no question calling for action of any kind by the League or its officers.

The Interest of the League in the Reservations

If, on the other hand, the Court, as had been officially proclaimed, was in truth "an essential organ of the League," it was fitting and even imperative that the League should guard its own interest in the Court, and should therefore examine the effect of the American reservations upon the League's relation to this "essential organ." The question for the League was, therefore, not how the reservations would affect

the status of the separate States, but how they would affect the interests of the League.

The Court, it was recognized, had its roots in Article 14 of the Covenant of the League of Nations, which constitutes Part 1 of the Treaties of Peace made at Versailles. Representatives of the United States had signed these treaties, but the Senate of the United States had never ratified them. Not only that, the United States had made a separate Treaty of Peace with Germany, and would certainly never ratify the Versailles engagements. How then were these reservations contained in the proposal of conditional adherence coming from the United States to be interpreted? Was the proposal a wholly new orientation on the part of the American Government? And, assuming that it was, how would acceptance of the proposal affect the League and the provisions of its Covenant?

The Silence of the States and the Intervention of the Council

At Washington it was regarded as extraordinary that after several months had passed only three of the separate and independent States that had signed the Protocol of the Court had responded to the communications from Washington—Cuba, Liberia and Greece. Everywhere else there was silence. Was it

an illusion then to suppose that these signatories were individually charged with the responsibility of replying? What was holding them back? Upon the theory that had been acted upon, their reticence seemed unintelligible.

On March 10, 1926, the ominous silence was broken by a cable despatch from Geneva which announced that at a private session of the League of Nations Council, on that day, "a committee of four juridical experts was appointed to examine the reservations made by the United States Senate concerning America's entry into a world court." "Although," the despatch continued, "the Council members made a great attempt to maintain secrecy on this action, confirmation of it was obtained. The action," the despatch concludes, "practically defeats every purpose of the Senate's reservations."

The Effect of this Action in Washington

At Washington this sudden revelation of the League's intervention produced consternation. Was it then the Council of the League of Nations that was to control the situation and determine the decisions of those "separate and independent States" that had signed the Protocol of the Court, and who in the United States had been so emphatically represented as individually and severally the only

Powers involved in the formation and control of the Court? Evidently, the affair was not understood at Geneva precisely as it had been in Washington. The pious myth of "the separate treaty of various nations," as the Protocol had been called, seemed about to dissolve into thin air.

On March 18, the New York *Times* printed a despatch from Washington, stating that "administration officials were taken by surprise by the decision of the Council to convoke a conference at the Swiss capital on Sept. 1 in an effort to reach an accord on the American reservations governing adherence to the World Court. In the absence of definite information officials withheld comment, but it became evident to-night that they were at a loss to understand the meaning of the move."

On March 19, the New York *Times* reported from Geneva, that "the nations were wary of our reservations, and would not take individual responsibility for answering Washington." Who then was to take this responsibility? Was it the Council of the League with which Washington was to deal?

On March 20, the New York *Times,* commenting editorially on the situation, said that the League Council had "arranged for a friendly study of the reservations which the United States Senate attached to its vote adhering to the World Court. Thus in every way open to it the League of Nations shows

that it is prepared to keep on doing business at the old stand."

No happier expression of the truth could have been found or invented, than "prepared to keep on doing business at the old stand"! Here was signalized as quite normal precisely what the advocates of adhering to the Permanent Court had given assurance would not and could not happen. The League of Nations, it had been declared, had no particular interest in the affairs of the "World Court," a separate and independent organization. It was the free, self-controlled Court of the "separate nations." The League had nothing to do with the Court but to elect and pay the judges, and with that understanding the United States had been disposed to share in this noble enterprise. On the word of eminent jurists, the public, and the Senate too, had been assured that the Permanent Court of International Justice had no special relation to the League of Nations.

The League's Request for Negotiation

But this subject was not to be left in any obscurity. The Council of the League was not so indifferent to its own domination of the situation as the American advocates of the Court had represented.

On April 1 a formal invitation was received at

Washington from Sir Eric Drummond, Secretary General of the League of Nations, requesting by instruction of the Council that the Department of State would send delegates to a meeting of the Signatories of the Protocol, to be held at Geneva on September 1, 1926, to assist in framing an "agreement" regarding the terms for the adherence of the United States to the Permanent Court of International Justice.

Here was a second surprise for Washington. The Council of the League of Nations was actually proposing a negotiation with the United States on the terms upon which the United States would be permitted to adhere to the League's Court! The suggestion seemed incredible.

The Reasons for Surprise

There were several reasons why this proposal was a surprise. The first was that it had been understood in the United States that the door to the Permanent Court had been left open to the United States to enter at any time. What then was there to negotiate? Was it the meaning of the reservations, or was it a modification of them? The design of the reservations appeared perfectly plain. They required no interpretation. The aim of the Senate was to adhere to the Court without incurring any obliga-

tion to the League which had created it. The reservations were carefully framed to permit the United States to adhere to the Protocol without the risk of being enmeshed in the entanglements of the League's Covenant. Did the Council think it necessary to negotiate about that? Did the Council, in asking for negotiation, believe that something could be had from negotiators, some recognition of the League, which the Senate had not granted? What was it in the reservations that it was necessary to have modified? It did not take a long time to discover. The fifth reservation affected the privilege of the Council to use the Court as a means of intervention in American affairs. It was a privilege too dear to the League to be lightly surrendered.

But there was still another and a deeper cause of surprise. It had been held by the advocates of adherence to the Protocol of Signature that there could be no negotiations on this subject. The signers of the Protocol would not listen to any change. The Court existed; it was the only possible one; its Statute had been framed; it was too late to change it. Senator Lenroot had proposed modifications that would have separated the Court entirely from the League. Senator Pepper suggested alterations that would bring the Court more completely into line with American traditions on this subject. The late Senator Lodge advocated the substitution of a true

World Court, open to all nations, having no connection with the League, provided with a code of law to be formed as the League's own commission of jurists had recommended, but which the League had refused to accept.

Proposal of a Protocol of Peers

Finally, on the very day of the vote on the Senate's resolution of adherence to the Permanent Court of International Justice, January 27, 1926, Senator Williams asked the following question:

> "Is it not reasonable to suggest, now that the Court has been established by the League of Nations, that the United States could be able to know before committing itself to membership in this court—
>
> "First. Whether the members of the League of Nations who have signed this protocol are disposed to give to the United States an opportunity to accept the statute of the court as an independently established judicial body.
>
> "Second. Whether the signing of this protocol by the United States would not involve such connection with the League of Nations as is implied in the expression 'original members of the League of Nations.' That expression implies a certain present relation to the league.
>
> "Third. Whether the United States might have the assurance of the other members of the League of Nations which have signed this protocol that this court is not merely a league court but is

a world court—an independent body bound only by its own statute and not by the covenant of the League of Nations.

"Fourth. Whether the United States might be permitted to adhere to the statute of the court by a protocol of adherence in which the independence of the court and the complete equality of the United States would be agreed to by those who signed the protocol of 1920, all of whom were members of the League of Nations."

"I appeal to the Senators," said Senator Williams, "that it is idle for the opposing sides in the Senate to continue a battle over points which can never be decided in the Senate. It is not the Senators but those members of the League of Nations who have signed this Protocol who alone can decide these questions. . . . Is it not a reasonable proposition that the Senate and the people of the United States should know before acting what the effect of their action will be? It seems that no official inquiry has ever been made on this subject at any time."

All these suggestions were dismissed as utterly vain and hopeless. The Protocol of Signature, as prepared for the members of the League and ratified by the Assembly in execution of Article 14 of the Covenant, must stand unaltered. Only one course was open, if the United States was to adhere to this Court. A resolution must be passed by the Senate authorizing the President to sign the Protocol with

certain reservations. And this resolution was to be addressed, not to the League of Nations, but to the signatories of the Protocol for acceptance or rejection by them.

A Treaty That Was Never Negotiated

Thus, without preliminary negotiations of any kind, on the part of the United States, without official contact either with the Council of the League or with the signatories of the Protocol, assuming this document to be a "treaty,"—although the United States had had no part whatever in framing it,—the Senate ratified its provisions, subject to certain qualifications regarding the extent of the obligations thereby assumed.

This anomaly had been publicly pointed out during the deliberations of the Senate. It was distinctly shown that this document, the Protocol of Signature, was not a treaty, but merely a private agreement prepared by the League of Nations for its own members.

There was no just cause of surprise, therefore, in the United States when the Secretary of the League of Nations, by the instruction of the League's Council, invited the United States to send delegates to Geneva to explain the Senate's resolution.

The surprise of Washington was offset by the sur-

prise of Geneva that the Senate should ever imagine it could enter the League's Court without the approbation of the League! Was not the single official copy of the Protocol in the archives of the League's Secretariat? Was it not there that signature must take place? Had the Council of the League no interest in the conditions on which a State not a member of the League might adhere to the League's Protocol? Did the United States suppose it could ignore the League by addressing its communication to the signers of the League's Protocol, so carefully prepared for them and so unalterable, without negotiations of any kind? Was it not unusual for a government to sign an engagement without a preliminary discussion with those responsible for its existence? Delegates must be at once invited to come to Geneva to explain this procedure. In the meantime replies to the resolution of the American Senate should be withheld.

The Council of the League Speaks for the Signatories

Was this invitation to negotiate initiated by the separate and independent States, signatories of the Protocol? There is no evidence of it. It was the Council of the League of Nations that sounded the alarm, and with good reason.

What was to become of the solidarity of the

League if an outside nation could confer directly and separately with each signatory of the Court Protocol? There must be unity of action. Besides, was not the Council's own prerogative menaced by the proposal that a limit should be placed upon the exercise of functions solemnly accorded to the Council by the Covenant of the League? Was it not a duty of the Council to notify the signatories that they were united by another and a more fundamental pact than that of the Court? And so the warning went out, "Do not answer the communications of the United States about the Court separately." In the interest of our alliance we must examine these reservations together.

The *Times* then was right. The League was "still doing business at the old stand"!

Of course it was only the free and independent signatories of the Protocol who were invited to deliberate. Even though it was the League's Court, it was only those who were pledged to it who should decide upon its destinies. It could not be otherwise.

Was it the League then that was acting on these American reservations? Formally, no; substantially, yes. In the committee of the signatories there was no State represented that was not a member of the League. A majority of the Council sat in the deliberations of the committee. It met and debated in the League's meeting-place. Its purpose of union was

to protect the interests of the League, and its report is a scheme to insure that protection. The whole theory of the discussion was that these signatories of the Protocol establishing the Court were bound by a common tie that antedated this new creation, and that the Protocol itself was but the culmination of a purpose expressed in Article 14 of the Covenant. How then was that purpose to be affected by these American reservations? That was the question before this committee of the signatories.

The American Refusal to Negotiate

If the intervention of the Council of the League in taking charge of the replies to be made to the American proposal by the independent sovereign States had caused consternation at Washington, the proposal of April 1 to send delegates to Geneva for the purpose of negotiating the terms of adherence to the Protocol tended to awaken indignation. It was with the League then, and not merely with the signatories of the Protocol, acting freely and independently, that the United States had to deal; and this was precisely what the reservations had been designed to avoid! Even pro-court senators began to ask, Is there then no way to adhere to this Court without the intervention of the League of Nations? If we recognize the authority of the League in this

matter now, shall we not be obliged to recognize it in the future at every turn of the road?

The President was prompt to sense the situation thus disclosed and to take his stand. He did not hesitate to make his position clear. The reservations, he announced, require no interpretation, and it rested with the signatories of the Protocol alone either to accept or to reject them.

To this decision there was no audible dissent. "The feeling exists in Administration circles," declared a Washington despatch of April 2, "that the call of the Secretariat of the League of Nations gives semblance to the impression here that the Court is under the domination of the League of Nations."

It being firmly believed at Washington that the only powers to be dealt with were the forty-eight members of the Court, the invitation of the Council was declined, and the action of the meeting to be held in September was to be patiently awaited, with the understanding that the decision regarding the proposal of the United States rests upon the final action of the signatories of the Protocol.

The League Bloc Stands Firm

No one could reasonably question the legitimacy of the action taken by the Council of the League of Nations both in wishing to cause the signatories

of the Protocol to act *en bloc* and in calling for delegates from the United States to discuss the reservations. The Permanent Court of International Justice being the League's Court, it was eminently proper for the Council of the League, charged with general oversight of the League's interests, as determined by the Covenant, to inquire with solicitude how the acceptance of these reservations might affect the League and the powers and purposes of the Council as well as those of the Court. If there was surprise in Washington at the Council's action, that surprise was not justly due to any unexpected action by the Council, but wholly to the misconception that had been established in the United States regarding the total detachment of the Court from the League. It would be an impertinence for any American to deny the right, and even the duty, of the League to watch with solicitude over the destiny of its own "essential organ," or for a Senator to resent the complete exercise of that right and the performance of that duty by the League's Council.

What stands as irrefutable in the result of the Great Assize at Geneva is the proved solidarity of the signatories of the Protocol with regard to the interests of the League. At the call of the Council the meeting was held in September. Separate answers are still withheld, and general assent appears to have been given to the conclusions worked out by

the committee in examining the American reservations and their effect upon the provisions of the League's Covenant.

The Legitimacy of the Procedure

It would be tedious to follow step by step the discussion concerning these reservations last September by the signatories of the Protocol. What is important is the formula worked out by the committee appointed to pronounce in what form the replies of these separate independent States are to be expressed.

There can be no just complaint by an outsider regarding either the formula thus presented or the procedure by which it was elaborated. The Council of the League has acted entirely within its rights in commending action *en bloc* and there can be no fault found with the signatories of the Protocol for thus acting together and by advice. The only criticism that may properly emanate from America should fall upon those responsible for creating here a misconception of the relation of the League to the Court; if indeed it is possible to fix any responsibility for popular clamor excited by pious zeal for action without any foundation of exact knowledge.

The Motive of the Reservations

It was perfectly reasonable for the Council of the League of Nations and for the committee of signatories of the Protocol appointed at its suggestion, to prepare a uniform answer, to ask the question, What is the object of these American reservations? What is the motive that has actuated them?

In the United States the answer to this question was clear. It was, simply, To avoid entanglement with the League of Nations as a military and political alliance, in which the United States has declined to participate.

For the members of the League, however, it was perfectly natural to inquire, Why, if the United States wishes to avoid participation in the League of Nations, does it wish to adhere to the Protocol of the Permanent Court of International Justice, created by the League as one of its essential organs? Does not the Government of the United States know that this Protocol was framed by and for the members of the League, and that the door left open for the adherence of the United States was left open for no other reason than the fact that the United States had signed the Treaties of Peace containing the Covenant of the League, and that this Protocol was drawn exclusively for those who either were, or were expected to become, members of the League? What

then is the signification of this resolution of the Senate? What is it the Americans want? Can they be accepted as adherents of the Court and at the same time openly repudiate the League which created it? Let them come here to Geneva and explain.

The Question of Equality

It would be churlish for Americans, taking into account the relation of the League of Nations to the Permanent Court of International Justice, to see in the procedure of the Council any lack of courtesy or friendly consideration. The invitation to discuss the subject was a sincere effort to come to an understanding, which had not before been attempted.

Having no official information on the subject, it was quite natural for the signatories of the Protocol to accept the plausible explanation that what the Senate was aiming at in its resolution was only to secure for the United States a part in the Court on terms of perfect equality with members of the League, without actually becoming a member of the League.

Upon that assumption, concluded the committee, it would be easy to find a way to accommodate the United States. And so, prefacing its report with the statement that "adherence to the Protocol of Dec. 16, 1920, by the United States under special con-

ditions necessitates an agreement between the United States and the signatories of the Protocol," it takes up in order the five reservations in the Senate's resolution, as follows:

Reservation One—It may be agreed that the adherence of the United States to the protocol of Dec. 16, 1920, and the statute of the Permanent Court of International Justice annexed thereto shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the treaty of peace of Versailles of June 28, 1919.

Reservation Two—It may be agreed that the United States may participate, through representatives designated for the purpose and upon an equality with the other States members of the League of Nations represented in the Council or in the Assembly, and in any and all proceedings of the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice, or for the filling of vacancies.

Reservation Three—It may be agreed that the United States pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.

Reservation Four—(a) It may be agreed that the United States may at any time withdraw its adherence to the protocol of Dec. 16, 1920.

In order to assure equality of treatment, it seems necessary that the signatory States, acting together and by not less than a majority of two-thirds, should possess the corresponding right to

withdraw their acceptance of the special conditions attached by the United States to its adherence to the said protocol in the second part of the fourth reservation and the fifth reservation. In this way the status quo could be re-established if it were found that the arrangement agreed upon was not yielding satisfactory results.

It is to be hoped, nevertheless, that no such withdrawal will be made without an attempt by a previous exchange of views to solve any difficulties which may arise.

(b) It may be agreeable that the statute of the Permanent Court of International Justice annexed to the protocol of Dec. 16, 1920, shall not be amended without the consent of the United States.

Thus far all flows on pleasantly, but in touching upon the fifth reservation the question of "equality" gives rise to complications. The Senate's resolution demands

> "That the Court shall not render any advisory opinion, except publicly after due notice to all States adhering to the Court and to all interested States, and after public hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

The American Right of Veto

If a request by the Council for an advisory opinion from the Court required a unanimous vote, there ap-

peared to the committee a good reason for the American demand; since, not voting with the Council, it would have no voice in the matter.

The question was then raised, Does such a request for an advisory opinion from the Court require unanimity, or can an opinion be requested by a majority vote? In the latter case, the committee thinks, the United States might be allowed a vote, but not a veto; for a vote would give it equality with the members of the Council, while a veto would give it a power possessed by no other nation.

Upon inquiry it was discovered that the question of unanimity was not settled; and, being unsettled, the committee could not recommend an unqualified acceptance of the fifth American reservation.

Down to this one, it had found itself able to say to the signatories of the Protocol regarding each reservation, *"It may be agreed"*; but here agreement could not be recommended. The American proposal struck at a vital part of the Covenant of the League, the right of the Council of the League to ask of the Court its opinion upon any question the Council might wish to ask. This was fundamental to the whole conception of the Court, as defined in Article 14 of the Covenant; which conception is unique in this, that it is not that of a court of justice simply, but joins to it a non-judicial function, namely, that of confirming the League in such action

as the Council wishes to take, and for which it desires the prestige and moral support of a nominally judicial tribunal.

Could not the United States be satisfied with a vote, instead of a veto? What more could it demand than complete equality with the members of the Council, who already have more power than the members of the League who are not members of the Council?

The conference of the Signatories seems not to have been aware how far it was from the truth in supposing that what the United States demanded was equality with members of the League of Nations.

If the purpose of the United States were to obtain equality with members of the League, the best way to attain that end would be to join the League outright. What the Senate resolution intends is that questions in which the United States has or claims a particular interest are not to be submitted to the Court with a request for an answer without its consent. Members of the League may submit to this, but the United States will not. There are questions, even questions which affect the interests and desires of other nations also, which the United States does not intend to have submitted to the Court without its consent.

It is impossible to enumerate all these questions, and therefore the demand for a veto must be general

and absolute. One might mention tariffs, immigration, relations between debtor and creditor, and a host of others; but possible cases can not be foreseen, and therefore would better not be explicitly mentioned. An omission might reopen the whole subject.

The attitude of the United States then is that it will not adhere to the Permanent Court of International Justice, if it can not itself determine what disputes or questions in which it has or claims an interest shall be submitted to the Court by the Council of the League for an advisory opinion. It is not equality, it is independence that is involved in this reservation.

The attitude of the conference on this subject is expressed in the following paragraph.

"But the fifth reservation appears to rest upon the presumption that the adoption of a request for an advisory opinion by the Council or Assembly requires a unanimous vote. No such presumption, however, has so far been established. It is therefore impossible to say with certainty whether in some cases or possibly in all cases a decision by a majority is not sufficient. In any event the United States should be given a position of equality in this respect; that is to say, in any case where a State represented on the Council or in the Assembly would possess the right of preventing, by opposition in either of these bodies, the adoption of a proposal to request an advisory opinion from

the Court, the United States shall enjoy an equivalent right."

Clearly, the purpose of the United States, in so far as it has been expressed, and the purpose of the signatories of the Protocol of December 16, 1920, are conflicting and incompatible.

The conference at Geneva proposes an attempt to reconcile these differences, and offers the draft of a new Protocol as a basis of this *rapprochement*. Whether this proposal leads to action or inaction, the whole subject of adhering to the Permanent Court of International Justice is wrapped up in accepting or rejecting its overtures.

CHAPTER V

The Price of Association in the League's Court

TO the diplomatists and jurists of Europe and the Orient assembled at Geneva to consider the American Senate's resolution of adherence to the Permanent Court of International Justice, it seemed incomprehensible that the people and statesmen of the United States could expect to be associated with a close corporation, like this tribunal, upon their own terms and without a previous exchange of views.

It is true, that in the Protocol of Signature by which the Statute of this Court was adopted and the Court created, the States mentioned in the Annex to the Treaties of Peace were permitted, because of their previous acceptance of those treaties, to adhere to this agreement by their signature. That concession was made, however, in December, 1920, while President Wilson was still in office, and more than two months before the accession of Mr. Harding, then President-elect, to the Presidency.

From the fact that the Protocol of Signature of

December 16, 1920, was drawn exclusively in the name of "members of the League of Nations," and no special conditions were mentioned for the adhesion of States not members of the League, it is evident that this permission to adhere to the Protocol was given in contemplation of subsequent adhesion to the League as well as to the Protocol of the Court.

The Position Taken at Geneva

In assuming that the door left open to the United States implied the right of the United States to adhere to the Court upon its own conditions, the Senate resolution was, in the opinion of the conference of signatories, premature. A previous conversation on the subject was thought necessary.

The first step to be taken, therefore, after the terms of the resolution became known to the Council of the League of Nations, appeared to that body to be a conference between the signatories of the Court Protocol as a group and delegates to be appointed by the United States to explain the meaning of the Senate resolution of January 27, 1926, authorizing conditional adherence to the League's Court. Hence the proposal of April 1, 1926, that such delegates should be sent for this purpose to attend a meeting of the interested parties in Geneva in the following September.

The Proposal of Formal Negotiations

The refusal of the United States to send delegates to Geneva to attend such a meeting and explain the Senate resolution made it appear desirable for the conference of signatories who had created the Court to act on its own initiative and prepare a statement of the terms on which the Court was open to the adhesion of the United States.

This formal statement, proposing a "Protocol of Execution," to be signed by the United States and the signatories of the original Protocol, has been sent to the Department of State at Washington, and is now awaiting a reply.

It is of importance for every person interested in the relation of the United States to the Permanent Court of International Justice,—and, judging from the immense urgency that forced action on the Senate resolution, they are very numerous,—to know precisely the reasons why this resolution was unacceptable to the signatories of the Court Protocol. These reasons are important, because it would be anomalous for a movement so expensively financed and so urgently pressed as the proposal to adhere to the so-called "World Court" to end in a blind alley, as it seems likely to end, without knowledge of why it had that fate.

It is then to the statement offered by the confer-

ence of signatories that we must look for this explanation,—a document included in its report under the title

PRELIMINARY DRAFT OF PROTOCOL

The States signatories of the protocol of signature of the Permanent Court of International Justice dated Dec. 16, 1920, and the United States of America through the undersigned duly authorized representatives have agreed upon the following provisions regarding the adherence by the United States of America to the said protocol, subject to the five reservations formulated by the United States.

Art. 1—The United States shall be admitted to participate through representatives designated for the purpose and upon an equality with the signatory States of the League of Nations represented in the Council in the Assembly in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice, provided for in the statute of the Court. The vote of the United States shall be counted in determining the absolute majority of votes required for the statutes.

Art. 2—No amendment of the statute annexed to the protocol of Dec. 16, 1920, may be made without the consent of all the contracting States.

Art. 3—The Court shall render advisory opinions in public session.

Art. 4—The manner in which the consent provided for in the second part of the fifth reservation is to be given will be the subject of an under-

standing to be reached by the Government of the United States with the Council of the League of Nations.

The States signatories of the protocol of Dec. 16, 1920, will be informed as soon as the understanding contemplated by the preceding paragraph has been reached.

Should the United States offer objection to an advisory opinion being given by the Court at the request of the Council or the Assembly concerning a dispute to which the United States is not a party or concerning a question other than a dispute between States, the Court will attribute to such objection the same force and effect as attaches to a vote against asking for the opinion given by a member of the League of Nations either in the Assembly or in the Council.

Art. 5—Subject to the provisions of Article 7 below, the provisions of the present protocol shall have the same force and effect as the provisions of the statute annexed to the protocol of Dec. 16, 1920.

Art. 6—The present protocol shall be ratified. Each State shall forward the instrument of ratification to the Secretary General of the League of Nations, who shall inform all the other signatory States. The instruments of ratification shall be deposited in the archives of the League of Nations.

The present protocol shall come into force as soon as all the States which have ratified the protocol of Dec. 16, 1920, including the United States, have deposited their ratifications.

Art. 7—The United States may at any time notify the Secretary General of the League of Nations that it withdraws its adherence to the proto-

col of Dec. 16, 1920, the Secretary General shall immediately communicate this notification to all the other States signatories of the Protocol.

In such case the present protocol shall cease to be in force as from the receipt by the Secretary General of the notification by the United States.

On their part each of the contracting States may at any time notify the Secretary General of the League that it desires to withdraw its acceptance of the special conditions of the adherence of the United States to the protocol of Dec. 16, 1920, in the second part of the fourth reservation. The Secretary General shall immediately give communication of this notification to each of the States signatories of the present protocol. The present protocol shall be considered as ceasing to be in force if and when, within one year from the receipt of the said notification, less than two-thirds of the contracting States other than the United States shall have notified the Secretary General of the League of Nations that they desire to withdraw their consent to the adhesion of the United States.

Art. 8—The present protocol shall remain open for signature by any State which may in the future sign the protocol of signature of Dec. 16, 1920.

Although the foregoing document is presented under the modest title of a "Protocol," it is clear that in substance it is a project of a formal treaty between the United States and forty-eight Sovereign States having divergent interests, and is not a mere mutual agreement as to common rights and

duties. It is, on the one side, a concession of something offered as a privilege, namely, the opportunity for the United States to associate itself with these forty-eight States in relation to the Permanent Court of International Justice. On the other, it is a proposal that, in exchange for this privilege, the United States should retract its fifth reservation in the Senate's resolution, under penalty of having its adherence to the Court either refused acceptance or made subject to a future withdrawal of acceptance. On this point the project presents a virtual ultimatum. No assurance will be given that an advisory opinion will not be asked of the Court by the Council or the Assembly of the League of Nations on a question in which the United States has or claims an interest without its consent. A contingency may arise in which such a question will be asked, whether the United States consents or not.

The reason for taking this position is that Article 14 of the Covenant of the League explicitly accords to the Council and the Assembly the privilege of referring to the Court such questions as they decide to refer. This privilege, being a part of the Covenant of the League, can not be alienated by according to the United States the right to nullify by withholding its consent that a question in which it has or claims an interest may be asked.

The position thus taken by the signatories of the

Court Protocol is entirely within their rights. It involves more than a right, it is a consequence of obligations which the members of the League have voluntarily assumed with one another. It is a bond between the League and the Court which the signatories of the Protocol do not desire to sever.

The League's Requirement Mandatory

The protest of any one of the forty-eight States who are bound by the Covenant of the League of Nations would suffice to prevent the concession of an exceptional right to veto a demand for an advisory opinion. The conference could not recommend such a concession. The Court would itself, upon appeal, declare that a single protest against such an exceptional privilege is valid. If, therefore, the United States wishes to adhere to this Court, it must modify the demand of the Senate's resolution, that no question can be presented to the Court for an advisory opinion in which the United States has or claims to have an interest without its consent. If the United States is permitted to adhere to this Court, which is constituted for the express purpose of furnishing advisory opinions, the United States must be content to have such questions submitted without its consent.

The Court may no doubt exercise its discretion

regarding a reply to the question calling for its opinion. It may sometimes refuse to be interviewed about its convictions, even by the Council of the League of Nations. But however exalted the motives, and however sagacious the prudence of this Court, it is bound in the last analysis to regard as paramount law the Covenant from whose inspiration it owes its being and to whose membership it must look for continued maintenance. It is morally bound, therefore, to perform its advisory as well as its judicial functions, whenever a substantial interest of the League is involved in a question submitted to it. In brief, by the precise terms of the "Preliminary Draft Protocol," it is the League's Court, and therefore not a "World Court."

The conclusive proof of this is found in the first paragraph of Article 4, which prescribes that the manner in which consent may be given, if it is given, "will be the subject of an understanding to be reached by the Government of the United States with the Council of the League of Nations." The whole question of consent or non-consent on the part of the United States must be taken up and negotiated with the Council of the League; and, if and when an understanding is reached, it will be communicated to the several signatories of the Court Protocol by the Secretary General of the League (Article 6).

The Different Position of an Outsider

It is then the Council of the League of Nations with which the United States must have an understanding before there can be adherence to the Permanent Court of International Justice. The reason for this is obvious. Being the League's Court, accession to participation in it inevitably requires an understanding with the League's chief authority. The signers of the Protocol and the Court itself are here remanded to the background. The approach to them is through the Council, which was charged in Article 14 of the Covenant of the League with the duty to "formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice."

The authority of the Council in this matter is incontestable. By the members of the League this supervision by the Council has never been doubted or brought into question. Only in the United States has a different theory been exploited, and this theory is now repudiated in plain terms. If you wish to adhere to this Court, send your delegates to Geneva and rap on the door of the Council of the League. There is nowhere else to go. The signatories when individually approached are silent. They await the "understanding" with the highest authority. Let

there be no surprise, above all no resentment, on account of this. There is in the result of the conference at Geneva no inconsistency. Any one at any time might have known the true relation of the League and the Court by simply reading the documentary history of the origin of this tribunal with its double functions, judicial and advisory.

There was a reason in the mind of the framers of the Covenant for endowing the Court with the advisory function. We read in this report of the conference at Geneva:

> "Great importance is attached by the members of the League to the value of advisory opinions given by the Court as provided under the Covenant. The conference is confident that the Government of the United States entertains no desire to diminish the value of such opinions in connection with the functioning of the League of Nations. Yet the terms employed in the fifth reservation are of such a nature as to lend themselves to a possible interpretation which might have that effect. The members of the League of Nations would exercise their rights in the Council and in the Assembly with full knowledge of the details of the situation which has necessitated a request for an advisory opinion, as well as with full appreciation of the responsibilities which a failure to reach a solution would involve for them under the Covenant of the League of Nations; a State which is exempt from the obligations and responsibility of the covenant would occupy a different position."

Owing to this "different position" of a State "exempt from the obligations and responsibility of the Covenant," its consent to a request for an advisory opinion of the League's Court would naturally have to be carefully guarded in the interest of the League. May not the League use its own Court for the purpose for which it was created? And what was that purpose, if not to give to the action of the Council and the Assembly,—which are political and not in any sense judicial bodies,—the protection that may be derived from the prestige of a judicial tribunal? By this device the authority of apparently independent judges could be transferred to the action of a political organization, which can ask for opinions but can not, under any circumstances, itself be brought into court to give an account of its acts.

For this unusual function of an international court the United States would have no need. But the League, if there were no veto on the procedure, could settle all disputes, so far as a court opinion could settle them, by mere "opinions," without the formality of a legal trial. The League's right under Article 16 of the Covenant of the League to forbid all commerce with a delinquent member under punishment, even with a nonmember of the League, and to carry on war in defence of that obligation of the Covenant, for example, would no doubt be sustained as a right by an opinion of the League's Court. If

Cuba, as a member of the League, were the object of this punishment, all commerce between Cuba and the United States being prohibited by this article, would not the League's Court affirm the League's right to inflict this penalty? Where then could the wrong thus done to an outsider be adjudicated, unless by battle?

The Manner and the Substance of Consent

In Article 4 of the "Preliminary Draft Protocol" prepared by the Geneva conference, emphasis is laid upon the "manner" in which consent to the demand for an advisory opinion affecting the United States might be given. Since a representative of the United States is not expected to be always present in the sessions of the Council and Assembly when advisory opinions are asked of the Court, how is the consent of the United States to be obtained? Must these bodies wait for a telegraphic answer? And who, in the end, is to give the consent of the United States that a particular question "in which the United States has or claims an interest" may be sent to the Court for an answer? Is it the President only, or does this decision require action by the Senate?

Notwithstanding its apparent complexity, the subject of the "manner" of giving consent is not beyond the possibility of an understanding; but it is trivial

to raise difficulties about the manner when it is the substance of consent that is the vital matter.

The Preliminary Draft proposes to accord to the United States perfect equality with every member of the Assembly and the Council with regard to filing its objection to submitting a question to the Court. This seems just and even generous, and the concession will perhaps be applauded by advocates of adhesion to the Court as all that could be expected or demanded.

What then is the consequence of this principle of equality as regards consent? Article 4 of the proposal formulates the answer to this question thus: "If the United States offers an objection to an advisory opinion being given by the Court at the request of the Council or the Assembly, the Court will attribute to such objection the same force and effect as attaches to a vote against asking for the opinion given by a member of the League of Nations either in the Assembly or in the Council."

This solution appears to indicate that advisory opinions are to be asked for by a majority vote either in the Assembly or the Council. At the will of the majority in either body they are to be sent to the Court; and, after they have been received by the Court, the "*Court* will attribute to the objection the force and effect of a vote" against asking the question! This means of course that the United States

would be recorded as voting against asking the question already sent to the Court, but this vote would have value only if it changed the majority to a minority.

Not a Vote but a Veto

After this skirmish regarding the manner of giving or withholding consent by a non-member of the League, the conference at Geneva appears at last to have faced the real issue presented by the Senate's resolution, which is not that the United States asks for equality with members of the League, who are loaded with the obligations and responsibility of the Covenant of the League, but whether or not an application for adherence to the Protocol establishing the Permanent Court of International Justice can be granted with the clear understanding that the United States is bound by none of the obligations of the League, and is in no way to be affected by the responsibility of others regarding it. This application was made on the assumption that this tribunal is a "World Court," that is, a tribunal regulated solely by the Statute of the Court, without any relation to the Covenant of the League of Nations.

What the fifth reservation in the Senate's resolution demands is, therefore, not a vote on particular advisory opinions, but a veto on the unlimited use of

a Court of Justice as a director of international policy or as a legal adviser.

A Court of Justice not an Organ of Advice

This Court claims to be a court of justice. A court of justice renders decisions according to law,—a law which has been accepted as a rule of action by the nations who appeal to it for the protection of their rights against encroachments which they believe to be unwarranted under the law.

A law can be definite, and it can be known before action. But advice is peculiarly bound up with policy. Advice is usually a result of temperament and of various conceptions of interest. It is in no sense appertinent to judicial process.

The whole movement of thought in this "Preliminary Draft" is motived by the idea that what the United States should demand is simply equality with the members of the League of Nations who have accepted certain obligations and responsibility. Having declined to assume those obligations and that responsibility by becoming a member of the League, the United States is indeed in a "different position" from that of States that have assumed the obligations and responsibility of the Covenant.

For the United States to renounce its prerogative of freely giving or withholding its consent regarding

the submission of questions in which it has or claims to have an interest to the Permanent Court of International Justice for its opinion would be to subject its national policies to the intrusion of a foreign body of men, acting, not in a judicial but in a quasi-political capacity, without the security of established law and the guarantees of judicial procedure.

In refusing to approve the submission of all questions of an international purport for the advisory opinions of this tribunal there is no sign of reluctance to comply with all international duties. On the other hand, there is reason to believe that a temptation may arise, and be strong enough to influence action, to pose questions the object of which is not so much to obtain advice or call forth a suggestion of rectitude, as to obtain for a particular course of action of interest to the League or some of its members the support and prestige of a so-called judicial tribunal without observing the guarantees of justice that surround a legal process.

In view of the fact that the majority of the signatories of the existing Protocol have not pledged themselves to submit any of the differences between them to its legal jurisdiction and decision, but agree to do so only when both sides consent, it is inconsequent to claim a prerogative to interpellate this tribunal of justice upon any question that may arise, and especially upon such questions as may be objec-

tionable as tending to influence public opinion favorably or unfavorably to particular claims and propositions.

That jurists who are citizens of a single State have sometimes, even when organized as a court, been called upon to express advisory opinions regarding the desirability of laws under consideration by the legislative bodies of the countries of which they are citizens, can not fairly be advanced as an argument that such advice is a normal function of an international court, in which the judges represent various and sometimes conflicting conceptions of law and public policy.

The Fundamental Reason for Demanding Consent

There is sound reason, therefore, for the position taken in the fifth reservation of the Senate's resolution of adherence, that if the United States adheres to the Protocol of Signature, it must be with the clear understanding that no question is to be sent to the Court for its advisory opinion if that question is one in which the United States has or claims an interest without the consent of the United States.

In view of certain questions which have already been suggested for reference to the Court regarding matters of domestic policy and internal legislation, this demand is fully justified. No political party in

the United States would ever make itself a sponsor for the idea that these subjects should be made objects of advisory opinions by any international court. The mere posing of such a question, aside from any opinion that might or might not be given by the Court, would be an unwarranted intrusion in the private affairs of the United States, and would not only be resented if it occurred, but should be prevented from occurring by every legitimate means at the disposal of this country. It would, therefore, be the height of imprudence to place the Government of the United States in a position where in the name of "equality" it had committed itself to the complete forfeiture of its independence in a matter that is political and not in any true sense judicial.

The Perversion of an American Idea

It is of supreme importance at this critical moment, when it seems that there is a determination of the League of Nations to monopolize the Permanent Court of International Justice, and on technical grounds to exclude the United States from what in this country has been proclaimed as the only possible World Court, that the position of the United States should be made perfectly plain.

The idea of a World Court, as has so often been proclaimed, is an American idea. It grew out of

the basic principle of self-government by separate States and their moral accountability to one another under laws voluntarily agreed upon and accepted by them.

To that idea the American peoples, and preeminently the United States of America, have always desired to be loyal. It is that loyalty that has given in the United States such a powerful impulsion to the proposal to adhere to the Permanent Court of International Justice.

The counter current in the debate on this question has not proceeded from the fact that this tribunal has been brought into being by the League of Nations, but from the now established certainty that this League intends to treat this Court as its own, and to exclude from it those nations which will not accept obligations which are peculiar to the League but have no proper place in the organization of a judicial body.

It is not a slight circumstance that the warning against adherence to this Court has proceeded from American statesmen and jurists whose careers and experience, as well as the advantage of their positions for obtaining precise knowledge on the subject, have specially qualified them to comprehend the situation. These men have insisted that this Court is the League's Court, and not really a World Court. The reservation which has proved a stumbling block to

acceptance by the League of the Senate's resolution of adherence is known to have been suggested and insisted upon by American jurists most intimately conversant with the history and functioning of this Court as absolutely necessary to the maintenance of the traditional American policy on this subject.

The Traditional American Policy

It must never be forgotten that at the bottom of every international problem there exists historically a certain distinctiveness in American institutions that sets them apart from the rest of the world.

This was perhaps most marked at the birth of this Republic which challenged and revolutionized human government as it had been thitherto conceived and practiced.

Its main ideas were well expressed in the "Farewell Address" of the first President, which was not merely an individual pronunciamento but the expression of the consensus of opinion in his time.

> "Europe has a set of primary interests, which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities."

Among "the set of primary interests" that marks off the disparity between Europe and America are two that have never ceased to be active and operative. One is the disposition of Europe to regard all the rest of the world as an open field for immigration and colonial exploitation. The other is the rivalry and jealousy developed in the effort to possess and use the land and resources of other countries. Asia, Africa and Oceania have been the scenes of this rivalry in exploitation. America has taken no part in this adventure, but would have been a victim of it had that calamity not been averted by the independence and courage of the American peoples, led and supported by the United States.

It is unnecessary here to speak of the Monroe Doctrine or to attempt to define it. Concretely it often seems like a different thing from what was proclaimed by President Monroe. The reason of this is that it is in essence nothing else than the principle of self-preservation, which assumes different forms in new circumstances of danger. As a distinguished naval officer has in substance expressed it, with Monroe, it was no extension of territorial holdings in the Americas by any European power; with Grant, no transfer of Mexico to a European power; with Cleveland, primacy of the United States in America; with Roosevelt, what we will not permit the Great Powers of Europe to do directly, we will

not permit any American State to make it necessary for the Great Powers of Europe to do to protect their interests; with President Coolidge, we shall not permit with our consent a political invasion of America by the interpellation of a private court organized for such purposes, to make America seem wrong when no law has been violated.

The United States still stands for and desires a World Court, but insists that it must be one where the law, and not trial by interviews, control the decisions of the Court.

At the first and second Hague Conferences the traditional policy of the United States was reaffirmed in the following words, which may well express the policy of the present and future:

> "Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State, nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude towards purely American questions."

Epilogue

THERE are those perhaps who would prefer to write the word "Epitaph" where I have written "Epilogue."

The facts presented in the preceding chapters do not justify that conclusion.

Not one of the reasons for desiring a World Court has disappeared, and not one of the arguments for it has been answered. The idea of a World Court will persist, because international justice is a legitimate object of human endeavor.

There is no essential antagonism between the idea of a Court of International Justice and membership in a political and military alliance for the preservation of peace like the League of Nations, provided each keeps to its own proper sphere. The same Sovereign States that constitute the League may also as individual States properly participate in such a tribunal, but it is anomalous that an alliance of this kind should assume to dictate the functions and organization of a tribunal of justice. It is impossible to believe that the United States is to be permanently excluded from participation in a World Court of Justice because it will not accept the obligations of the League.

The Attitude of the Adherents of the Court

It is clearly established by the course of events as well as by the documents which have been considered,

1. That the Permanent Court of International Justice is, and was intended to be, the League's Court, and at present is as much a part of the League as the Supreme Court of the United States is a part of its Government. It is not understood by the European and Oriental members of the League why the friends of the League in the United States have refused to speak of it as the League's Court, or should wish to represent so great a trophy of the League as anything else.

2. It is alleged by the members of the League that the Court has been organized with advisory powers which are regarded as of vast importance to the League; and that, although these powers are not of a judicial nature, the League is unwilling to suspend their application to any adherent of the Court, even though it be not a member of the League. The United States, as an outsider, must, therefore, accept the full exercise of these powers, it is announced, or its adherence to this Court is not desired by those who have established it. If adherence should be provisionally accepted by the signatories of the Protocol establishing the Court, it could only be with the express understanding that in case the United States

should refuse at any time to have submitted to the Court a question in which the United States has or claims an interest, that provisional acceptance of the adherence could be at once withdrawn, the obnoxious question would be asked without consent, and the United States would be no longer a member of the Court.

3. The "equality" which members of the League are willing to accord to the United States, and which they think should be accepted as satisfactory, is simply equality with members of the League with respect to an interest of the League which the United States does not share, namely, the surrender of freedom of consent to a majority of the Council or the Assembly for the benefit of the League as an agency of international control.

In brief, as a condition of being associated with this tribunal, which claims to be a World Court of Justice, the United States must engage to submit also to the non-judicial or advisory action of this tribunal, whenever an exercise of this function is demanded by the Council or Assembly upon an American question!

Assumptions Underlying the Senate Resolution

In approaching the signatories of the Protocol of the Court with a resolution of adherence, the Government of the United States has acted upon the belief:

1. That the Permanent Court of International Justice was not designed to be the League's Court in this restrictive sense, but a World Court of Justice;

2. That if the Permanent Court was really a World Court of Justice, it would not be insisted that a non-member of the League of Nations should be required to accept the non-judicial functions of the Court without its explicit consent;

3. Hence, the Government of the United States, as a precaution, if not as a test, demanded in its fifth reservation, that the Court should not be asked for advisory opinions without its consent in cases where the United States has or claims an interest.

This demand has been declared unacceptable, not because it affects any strictly judicial function of the Court, but because in a matter of non-judicial nature, it would create an inequality with members of the League and deprive a majority of the Council and the Assembly of a power to obtain from this Court a judgment on matters in which the United States has or claims an interest without its consent and without a judicial process.

Misunderstanding not Unfriendliness

Evidently the situation thus created is one of misunderstanding. There has been nothing unfriendly to the United States on the part of the Council of the League in the frank expression of the truth regarding the actual relation between the League and

the Court. On the contrary, the attitude of the Great Assize at Geneva has been most friendly.

Now that it is clear what needs to be explained, there is no just cause for further misunderstanding. Incompatible projects have met and collided. It should now be the common purpose not to destroy but to repair and construct. The Statute of the Court is not incapable of further adaptation, and a Protocol of Peers might render it acceptable to all nations.

Negotiation regarding the misunderstanding has been proposed from Geneva, and a draft of a new Protocol to be discussed with the Council of the League of Nations has been presented, having for its purpose reaching an understanding with the Council regarding the terms on which the United States may be permitted to adhere to the Court Protocol.

This procedure, it appears, is not acceptable to the United States. The way does not seem open to reach an understanding along these lines. If there is to be negotiation, it should be upon a broader conception of how a World Court should be constituted in order to deserve that name and fulfill that purpose. Should it be a close corporation, or open to all Sovereign States? Should it be a court of personal judgment, or a court of law? These appear to be questions that should be clearly answered, if a Court of International Justice is to receive the confidence of all civilized nations.

The Place for an Understanding

The place to answer these questions is not at Geneva but at The Hague. The Second Hague Conference was the only truly universal congress of nations that has ever been held. It included all the present signatories of the Court Protocol and all the other Members of the Society of States as well, forty-four in all. If the League and the Court Protocol claim a greater number it is because Australia, Canada, India, Ireland, New Zealand and South Africa now count and vote with Great Britain as seven, whereas at The Hague the British Empire counted and voted as one; Esthonia, Finland, Latvia, Lithuania and Poland count and vote as five, where Russia counted and voted as one; Austria, Hungary and Czechoslovakia count and vote as three, where Austria-Hungary counted and voted as one. Abyssinia, Albania and Liberia swell the apparent magnitude of the League as constituting the Society of Nations, while nations numbering hundreds of millions are not included in this group.

Until Germany was admitted to the League of Nations, barely half of Europe measured by territory or population was included in the League of Nations, not to mention the hostile aliens within the borders of the adherent States. A far greater number of human beings were represented in the Hague Conventions than in the League Covenant. It is pre-

posterous, therefore, to hold that the League of Nations is the legitimate successor of the Society of Nations that was represented at The Hague in 1907. It would be only by a *tour de force* that this Society of Nations could be abandoned. Legally it is in existence today as truly as when in 1918 Dr. T. J. Lawrence wrote:

> For almost a century the Society of Nations had been working its way toward an international legislature, and had almost reached its goal. It began by the recognition of express consent as a source of the laws which regulate the intercourse of states, side by side with the tacit consent embodied in binding customs. Then an organ was slowly evolved for the formal annunciation and registration of that express consent. This organ was a periodical assemblage of representatives of the governments of all civilized states. In 1907 its membership was almost complete. . . . Then came the day when the firm foundation of the earth rocked beneath our feet, and the light of the sun of progress was quenched in the red mist of war.[1]

A Third Conference at The Hague would include all the Sovereign States capable of formulating a Law of Nations. A series of conferences would render possible a World Law, such as that recommended by the League's own Commission of Jurists. It would not at once be complete, and like other human achievements it might never be perfect, but it would express the authoritative consensus of the

[1] *The Society of Nations*, p. 70–71. Oxford University Press.

will and desires of civilized mankind and stand as an honest effort to substitute consent for coercion and law for force.

The Reestablishment of the Society of States

Whatever may be the value of the League of Nations as a political and military alliance to those nations who constitute it,—and there is no reason to deny that it may have some value,—it is not, and it offers no promise of becoming, the complete Society of States for which it has endeavored to be a substitute. On the contrary, it is exposed to the possibility of gradual dissolution, as the reasons for its existence as an alliance disappear;—a process which has already begun through the actual withdrawal of some countries from the League and the threatened withdrawal of others. Founded as a hierarchy of Powers based on military strength, the League has already discovered that ambition for a permanent place in the Council has introduced a cause of alienation in the essential form of its organization.

The attitude of the League in sequestering the Permanent Court of International Justice, by treating it as an auxiliary and instrument of the League, to the exigencies of which the United States must either yield allegiance or remain excluded from adherence to the Court, is a demonstration that this organization can never include in its membership the real, the morally indestructible Society of States.

It is, therefore, back to the point of departure of this movement toward a usurpation of the authority of the Society of Nations that the world must move if there is to be a World Law and a World Court.

The documents printed in the Appendix to these chapters set forth with clearness and precision the historical attitude of the United States on this subject, and indicate in what manner a true World Court and a true World Law can be made possible.

This method may not for a time be found universally acceptable. It will be favored by all those possessing full information who really desire a law-governed world; but it will be opposed and obstructed by those who wish a free hand for political and military adventures and are therefore unwilling that Sovereign States should be governed by law.

The agitation of this subject at this time may be opposed by political expediency, but it can not be totally suppressed. Underlying all these private and temporary motives, there is a deep human aspiration for the organization of a world where peace may reign through justice. The sequestration of the only mechanisms through which that end may be achieved can not impose upon the world a perpetual silence. The only way to extricate a cause from a course of aberration is to bring it back to the highway of progress.

APPENDIX

I. PROPOSAL OF A THIRD HAGUE CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Monday, May 3, 1926.

The committee this day met, Hon. Stephen G. Porter (chairman) presiding.

The CHAIRMAN. The committee will come to order. H. J. Res. 221 was introduced by Mr. Tinkham. It reads as follows:

[H. J. Res. 221, Sixty-ninth Congress, first session]

JOINT RESOLUTION Requesting the President to propose the calling of a third Hague conference for the codification of international law

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, respectfully requested to propose on behalf of the Government of the United States, to the nations of the world the calling of a third Hague conference, or to accept an invitation to participate on behalf of the United States in such a conference upon the proposal of some other Government which had itself taken part in the second Hague conference, and to recommend to such conference the codification of international law, for the following purposes: (1) To restate the established rules of international law; (2) to formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful; (3) to endeavor to reconcile divergent views and to secure general agreement upon the rules which have been in dispute heretofore; and (4) to consider the subjects not

now adequately regulated by international law, but to which the interest of international justice requires that rules of law shall be declared and accepted.

Mr. TINKHAM. I desire to draw the attention of the committee to three formal official actions, suggesting the calling of a third Hague conference.

(1) The last resolution passed by the Hague Conference of 1907 was as follows:

Finally, the conference recommends to the powers the assembly of a third peace conference which might be held within a period corresponding to that which has elapsed since the preceding conference at a date to be fixed by common agreement between the powers, and it calls their attention to the necessity of preparing the program of this third conference a sufficient time in advance to insure its deliberations being conducted with the necessary authority and expedition.

(2) The Advisory Committee of Jurists, which met at The Hague in 1920 on the invitation of the League of Nations, which committee prepared the plan for the Permanent Court of International Justice of the League of Nations, made to the league the following recommendation:

I. That a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable for the following purposes:

1. To restate the established rules of international law, especially, and in the first instance, in the field affected by the events of the recent war.

2. To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.

3. To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore.

4. To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

II. That the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association, and the Iberian Institute of Comparative Law be invited to prepare, with such conference or collaboration *inter sese* as they may deem useful, projects for the work of the conference, to be submitted beforehand to the several

Governments and laid before the conference for its consideration and such action as it may find suitable.

III. That the conference be named Conference for the Advancement of International Law.

IV. That this conference be followed by further successive conferences at stated intervals, to continue the work left unfinished.

It seems that this recommendation of a committee appointed by the League of Nations in terms not only recommends that a third conference be held but excludes codification of international law by any other body except a third Hague conference.

(3) The Interparliamentary Union meeting at Washington in October, 1925, passed a resolution looking toward "an international conference of nations called for the purpose of effecting the codification of international law."

I wish to bring to the attention of the committee a law, which has not been repealed, which affects action in relation to the subject of this resolution. The general deficiency appropriation bill of 1913 contained the following language:

Hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so. (Congressional Record, 63d Cong., 1st sess., L. 1611, 1612.)

In view of this law, it would seem to me that not only is it appropriate for the Congress to take action, but if the law is to be obeyed it becomes absolutely necessary as a condition precedent to the President's calling a third Hague conference that a resolution of this character be passed.

* * * * *

The following, among others, urged the passage of this resolution:

Hon. David Jayne Hill, Washington, D. C., delegate plenipotentiary of the United States to the second Hague conference; former Assistant Secretary of State; and former American minister to Switzerland and the Netherlands, and former American ambassador to Germany.

Dr. James Brown Scott, president of the Institute of International Law and president of the American Institute of International Law; technical delegate of the United States to the second Hague conference; and former solicitor of the Department of State.

Charles Henry Butler, Esq., lawyer, Washington, D. C., technical delegate of the United States to the second Hague conference; former reporter of the Supreme Court of the United States.

Hon. Chandler P. Anderson, American commissioner Mixed Claims Commission, United States and Germany; former counsellor of the Department of State; American arbitrator, British-American Claims Arbitration Commission; and American arbitrator, Norwegian arbitration.

Rear Admiral William L. Rodgers, United States Navy, retired, Washington, D. C., former naval adviser to the American delegation to the International Commission on Rules of Warfare meeting at The Hague in 1922, and member of the advisory committee to the American delegation at the Washington Conference on the Limitation of Armaments, 1921–22.

Maj. W. Penn Cresson, professor of diplomatic history and diplomacy, School of Foreign Service, Georgetown University, Washington, D. C., former chief of the American military mission at the Belgian headquarters, and diplomatic secretary of the Washington Conference on the Limitation of Armament, 1921–22.

Hon. Lebbeus R. Wilfley, member New York City bar; former attorney general of the Philippines, and judge of the United States Court for China.

Arthur D. Call, Esq., secretary American Peace Society, Washington, D. C., and since 1919 secretary of the American branch of the Interparliamentary Union.

II. HEARINGS BEFORE THE COMMITTEE ON FOREIGN AFFAIRS

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Tuesday, May 4, 1926.

The committee met at 10.15 o'clock a. m., Hon. Stephen G. Porter (chairman) presiding.

The CHAIRMAN. If there is no objection, we will proceed with the hearing on House Joint Resolution 221, "requesting the President to propose the calling of a third Hague conference for the codification of international law."

STATEMENT OF DR. DAVID JAYNE HILL, WASHINGTON, D. C.

The CHAIRMAN. Doctor Hill, you have had quite a broad experience in public affairs, and I wish you would put in the record a brief statement of your activities.

Doctor HILL. It is rather difficult, Mr. Chairman, for a person to give his whole biography in a few sentences, but it is not necessary, I presume, to refer to more than a few things.

I was appointed by Mr. McKinley as Assistant Secretary of State in 1898, and became the first assistant to Secretary Hay. It was during my period of nearly five years in the Department of State that the Czar of Russia called the first conference at The Hague, nominally, for disarmament. Having written on this subject before, Mr. Hay requested that I take up the consideration of the subject in the department, reporting, of course, to him, he, in turn, reporting to the President.

I conducted all the correspondence with the American delegates at the first conference at The Hague. After that, I

was appointed minister of the United States to Switzerland, and then to The Hague, where I was in residence at the time of the second peace conference, as it was called, of 1907. I was a plenipotentiary delegate to that conference, being minister at the post, and was charged with the preparations for the conference, in so far as the United States was concerned, in its relations to the bureau of the arbitration court at The Hague. The delegates to the second conference at The Hague were Hon. Joseph H. Choate, former ambassador to Great Britain; Hon. Horace Porter, former ambassador to France; Judge Uriah Rose, who was not in diplomacy, but was an esteemed American jurist of the State of Arkansas; and Mr. Buchanan, who had been our minister to the Argentine Republic. Mr. Butler and Mr. Scott, who were heard from here yesterday—Mr. Scott by letter and Mr. Butler in person—were the technical delegates, or advisers in the technicalities of international law procedure. I believe that I am to-day the only living one of the plenipotentiary delegates to this second conference. Of the delegates to the first conference no one is living. Maj. Gen. William Crozier was the military adviser, and his colleague as the naval adviser was the late Admiral Mahan, who has long been dead. I could enumerate the plenipotentiary delegates to the first conference, but it is not necessary.

The CHAIRMAN. After that time, you were ambassador to Germany, were you not?

Doctor HILL. I was appointed in 1908 as ambassador to Germany, soon after the close of the conference.

I am here, Mr. Chairman and gentlemen, by your invitation, and, without it, I should probably not be here save as a listener. I have a strong prejudice against citizens representing their own personal ideas, or the ideas and principles of various societies with which they are connected, coming before committees of Congress to urge upon them particular measures of legislation or other action, and my feeling on this

is so strong that I would probably never in my life appear before this august committee, or before any other of like character, except upon its invitation. Coming in that spirit and attitude, I have no argument to make, and I have no plea to put forth, but I have come in response to your invitation to state what I think you may be interested in having me state, my views and apprehensions with regard to certain matters connected with the resolution which is before you for consideration.

It is obvious that without a body of international law approved and accepted by the nations that are to be governed by it, any international tribunal which undertakes to render legal decisions will be under the necessity of relying upon its own personal and, perhaps, conflicting views as to what the law is or should be.

It is equally evident that judicial decisions by an international tribunal made without any basis of accepted law imply an exercise by the judges of the sovereign authority which is involved in an act of legislation, and, therefore, can not be forced upon any nation, or even freely accepted by it, without a renunciation of its national sovereignty.

I mean to say by this that the sovereign power of legislation is given to him who makes the law, and if the judges make the law, because of their own peculiar views, principles, prejudices, and national interests, they become the sovereign power, and, to that degree, the sovereignty of the nation which authorizes that, or consents to that, passes from itself to other hands.

Now, when, on the other hand, an international tribunal undertakes to declare and apply a body of law previously agreed upon and accepted by the nations which appear before it, the tribunal exercises a strictly judicial authority based upon a law made by the nations under judgment.

The law then becomes the sovereign act of the nations that have provided it and that have approved it, and in this case the sovereignty has not departed from them. There is

no renunciation of sovereignty, but the law they make is the declaration, the assertion, and the affirmation of their sovereign power.

The assemblage of rules and doctrines now existing under the name of international law consists in substance of three elements:

First. Certain general principles of jurisprudence accepted quite generally as related to the conception of justice, as an abstract idea. These principles are of the most general character, and can be specifically applied to concrete cases only by a process of reasoning, and if the process of reasoning is a process of the judge's mind, the judge's mind is engaged in the exercise of the sovereign power that makes the law.

Second. Certain customary forms of procedure which have in the course of time been tacitly adopted in practice, or, at least, have been silently tolerated, and are enumerated by the text writers as the acts or decisions of international law. Many of these antiquated customs, invoked as precedents, are not founded upon justice, have never been considered with regard to their justice, and are merely the results of the exercise of superior power. Let us take, for example, the law of the sea: Who has made the law of the sea? The victor on the sea. Who has been obliged to submit to the law of the sea? The vanquished on the sea. To revive and perpetuate and consider as sacred these antiquated decisions of power does not constitute the kind of law that is accepted by the American people, and such laws are becoming unacceptable to any people.

Third. There are certain conventional agreements, voluntarily established after open discussion, in order to bring the second element, or the ancient customs, more into harmony with the first element, or the general principles of justice, but binding only upon those nations that have expressly accepted them. Now, this is the typical modern form for the development of international law, and it is only by this method that it will escape from being precisely what it is.

a junk heap of antiquated and perverted forms of justice that have been brought about by the supremacy of power. But to make it truly conventional, and not merely a number of casual agreements, the conventions in which it is embodied must be open to the collaboration of all sovereign powers, which are to be bound by this law, when it is elaborated and codified in conferences in which all the sovereign states are considered equal, and those conventions are binding only when they are ratified by some quasi-lawmaking power of the nations, as in the case where our Senate, as a branch of the lawmaking power of the United States, ratifies a treaty, whereby it becomes a part of the law of the land. This is a simple process, and it is the process that was practiced at The Hague in the first and in the second conference. It is a just process, and it is the method which I suppose it is the intention of this resolution to have continue, if possible, in the future, until we have so revised, elaborated, and, if you please, enlarged the scope of international law that it may become truly international law. Now, to do that, requires a general conference. It can not be done in a corner. You can not make a law apply to another sovereign nation without that nation's consent, and if you ask its consent after you have perfected the law according to your own ideas without its participation, you must expect that it will demur; you must expect that it will offer reservations or amendments, and that it will not accept it until it has had a chance to collaborate in it. That means just what I say, that there must be a conference and a general conference—a conference in which all the states are considered equal. All of them must be permitted, whether they actually do so or not, at their pleasure, to collaborate in the preparation of the law. In such a conference, in such a lawmaking body for the making of international law, the individual sovereign states must be equal, or, at least, considered equal.

Now, this word "equality," of course, may be applied

variously. Great Britain and San Domingo are not equal; certainly not as naval powers, I suppose, nor as commercial powers, nor in respect of military forces. But when you set about to make laws generally, what is it that you have in mind when you speak of "equality"? Is it your stature, your strength, or your weight as individual lawmakers? Is it the population of the State you represent? Is it the number of votes you have received in your last election? Nothing of the kind. All of that is extraneous. It is that there shall be an equal right and an equal voice in the making of the law as affecting the rights of those who are to be governed by the law. Therefore, however it may seem to the great powers, if there is to be a body of international law, it is not to be the pronunciamento of the great powers alone, but it is something that requires the collaboration of all the powers that are to be governed by it. If that does not exist, then it becomes imperialism, either the imperialism of a certain power or of a combination of powers, or of a confederation of States.

Those things are so simple and so rudimentary that I hesitate even to mention them; and yet, gentlemen, unless they become the base of our pyramid, we shall erect a very faulty and unstable structure.

Mr. EDWARDS. Will you yield for a question?

Doctor HILL. Certainly.

Mr. EDWARDS. What proportion of representation do you think would be proper among the nations in this court? For instance, take our own country, Great Britain, and France: How should the representation be apportioned, or what should be the proportionate representation of those nations?

Doctor HILL. I am not speaking of a court. I am speaking of a conference.

Mr. EDWARDS. Well, in the conference.

Doctor HILL. The object of the conference of which I am speaking is to frame a convention or treaty to be the embodiment of certain precepts of law and rules of action which

are to govern the conduct of nations. I am not now speaking of a court, but I shall do so presently.

Mr. EDWARDS. I used the term "court," but I meant the conference you have in mind.

Doctor HILL. Well, if there is a juridical equality between nations, why should there be any difference in the representation, so far as numbers are concerned? Why should the United States have 5 or 6 or 10 members in such a conference because it has 100,000,000 people, while another nation with 10,000,000 people should have only 1? An international conference does not represent the census of a country. It represents independent sovereignties. However, I shall touch upon that point again, if I am permitted, and time allows.

Now, the first and second Hague conferences were of this general character which I have described, and the second conference was the only one ever assembled in which all nations were represented for this purpose. The reason of that was that in the first conference our South American and Central American neighbors, or the Latin American Republics, were not present; and in the second conference it was seen that if we were going on with this method of making international law, those great commonwealths, with a great future—a future that, perhaps, taken in combination, would some time overtop Europe itself—could not be excluded. So they were invited to attend, and they did attend. Perhaps I might be permitted to say that they deported themselves in a manner that was very interesting and very satisfactory.

Now, a third conference was provided for, and in part prepared for, when the great war embroiled the international situation and prevented its convocation.

It should not be overlooked that the Hague conferences were designed to be, and were, in no respect military or political in their character, but wholly and solely juridical.

Now, I say that, in spite of the fact that when Czar Nicholas the Second called the first conference, he called it

for disarmament, which gave it a military bearing; nevertheless, it was in the interest of clearing the ground for juridical action. It was, in effect, to say, "Let us lay aside our instruments and implements of power; let us disarm, relatively, but not completely, and then let us come together and make just, wise, and suitable laws for our government in the future." Therefore, I say, that those conferences were not of a political character and were not of a military character, but were of a purely juridical character. What is contemplated now in the continuance of this series of conferences is a conference devoid of politics, devoid of mutual criticism, a purely juridical conference, in which jurists come together to propose rules of action. There was a marked progress in the second conference over the first in this respect.

The delegates to the first conference, with the exception of certain technical advisers, were nearly all diplomatists. They were men who were professional diplomatists, bred to it, trained to it, and practiced in it, and they behaved just as you would expect men of that ilk to behave, ever holding for all good things *en principe,* as they said, but unwilling to do anything of importance *de facto.* Therefore, the first conference was considered inadequate, and it did not begin to inspire the confidence and respect that the second one did. Now, the second conference, among other things, set itself to bring about the establishment of a court of justice. That was Mr. Root's idea, and that became the idea of the conference. We met with difficulties, and we met just the difficulties that my friend here intimates might arise in regard to the number of judges. The big nations said, "We are not going to have the representatives of little countries, like the Central American countries, or some other countries like that, sit on our great questions, or on our world wide commercial questions—not at all." Now, am I not taking up too much of your time?

The CHAIRMAN. No; we will be glad to hear all that you have to say.

Doctor HILL. There were 44 nations in that second conference, including our Latin friends to the south, but to have a bench of 44 judges would be ridiculous, as anyone who is familiar with legal processes would comprehend. It would be impossible. It was thought that 15 judges would be the maximum number for the bench, and some of them might very well be excused. It was thought that nine would be a big court, and, perhaps, three would make a better court. So we ran afoul of the difficulty of settling this juridical question as to the equality of sovereign states irrespective of their political and their military power. The little states said, "Well, we must have a judge," and the big states said, "Then we must have several judges." Finally they could not agree that there should be, say, 15 judges, each of the big powers having a judge on the bench, one all the time, and the little powers having judges in rotation.

Now, gentlemen, if you will stop to think of it for a moment, you will see that this idea of national representation in a court is not a juridical idea at all. It grows out of the magnitude of the different nations as compared with other nations, or of the big nations as compared with the little nations. It is true enough, and it is perfectly evident, that the great commercial and maritime powers have interests of infinitely greater importance than the little powers; but when you come to the question of justice, the amount involved is not the question. It is a question of principle and justice, is it not? If a man owes me $1,000,000, or if he owes me 50 cents, the question of justice is the same with regard to the fact of whether he owes me, or not; and, also, as to whether he ought to pay me, or not, if he can. This question of proportion and magnitude should be eliminated from the juridical consideration of international relations. If we are to be logical and loyal to principle, we have in the end

to come to the conclusion that we should not ask for personal representation in a court of justice, in the sense of a personal representative among the judges to pull the sleeve of the other judges and say it ought to be this way or it ought to be that way, or as a mere advocate to talk it over and help to make up the decision. That is not justice, gentlemen, and that is not the way a court should be constituted.

Then, there comes up the old difficulty of transferring sovereign power to a foreign judge, to decide according to his views or his pleasure or his prejudices, or from his national viewpoint, and that is a thing we will never do.

The CHAIRMAN. May I interrupt you to say that that is a vital defect in arbitration, is it not?

Doctor HILL. That is one of the defects of arbitration, especially where the arbitrators are chosen by the contestants, with the idea that each side is to have its influence. Then, it becomes a question of weighing influence, and the arbitration commission becomes a sort of scales in which you pile the influence of one contestant on one side and that of the other on the other side of the scales. That, however, is not justice. Justice is often represented as holding scales. Well, that is only a figure. It does not mean that there must be a judge favorable to you and a judge favorable to the other side, and then a third judge to sort of mediate between them and reconcile them to something. That is not legal justice. Let us come to the question of what is legal justice. Legal justice places the whole incidence of the question upon the law, and if you make the law and are satisfied with the law, first of all, you will try to keep the law. Then, you will never have a case in court unless you are challenged and can not avoid it. But if you do have to go to court, then to court you go, and then you say, "This is our law and we are ready to be judged by our law—not by your law, not by the judges' law, but by our law—a law that we have made." Perhaps I am too expansive on this subject.

The CHAIRMAN. May I interrupt you to say that we

wish you would speak just as long as you desire to do so? The committee will appreciate that very much, because you are throwing a great deal of light on this subject.

Doctor HILL. I wish to embody my thought in what I say as much as I can, in a perfectly conscientious spirit. Otherwise, there would be no use in my coming here. However, I do not want to take up too much of your time, and we are very liable to run off into the thousands of bypaths which open themselves in a discussion of this kind.

The peace settlement at the end of the war presented military and political rather than juridical problems. The question was, was it to be a peace with victory, or was it not? Somebody won the war, and what is the use of winning a war if you do not dictate the terms? Naturally, that was the thought, and so the problems were political and military, and not juridical. The problem of the war, it was felt, could be solved only in terms of military and political power, so that another war would not break out, or so that this war would not be resumed or continue after an interval. Now, these were problems of expediency rather than of justice, and they were treated accordingly. The juridical idea was not repudiated—no—but it was subordinated. There was a general feeling after the war that all laws that had ever existed had not prevented the war, and that many of the laws that had existed had been violated during the war. What, then, was the law? In this state of mind the problem was not more law, but the problem was the combination of political power and military forces to prevent the outbreak of another horror such as we had passed through. That was the natural psychology of the time and it was almost necessary, was it not?

Now, as I have said, that was not quite a repudiation of the juridical problem, but it was a postponement of it. It was a subordination of it, and, so far as it was retained, it was made to conform to the exigencies of the military and political groundwork of the world alliance aimed at in the

organization of the League of Nations. Now, the fundamental idea there was that if we, who had won the war, should hold together and associate with ourselves in a universal organization the powers that were neutral during the war, making a great mass of coordinated political and military power, and in that way preserving and protecting the political independence and territorial integrity of the powers entering into the alliance—perhaps, we could avoid another war. That was the outlook, that was the theory, and that was the point of view. That is the way the League of Nations was organized; but it was somewhat overlooked that there were nations in the world that would not take upon themselves the responsibility of insuring everybody's peace. That is because war is a spontaneous thing, liable to break out over-night, and those nations are not likely to send their fleets and armies to quell a thing of that kind. The League was inspired by psychological conditions growing out of the war. It was not a wide-sweeping vision over human history, nor a just estimate of the conditions, but only of political interests. It was nothing further than that, and it was a subordination of the juridical to the political and military power.

They did not wholly forget justice, but they rather overlooked it. Now let me say that in the first draft I have seen of the covenant of the League of Nations there was no reference to anything juridical—not a thing. There was no reference to any court and no reference to any law, but it was simply a combination of political and military power banded together in a world alliance to keep the peace. I am not here to say that was not a good thing. It may have been a good thing. I only know that we, 3,000 miles from its probable field of activity, did not enter into it. I will not discuss that subject further. What I am trying to do is to cast a little light upon the general phases of the situation, and not at all to enter into any kind of controversy.

It has become evident that whatever benefit may grow out of this organization, it is not at present universal. It aimed to be and it wished to be that, but it is not universal; and, not being universal, it is not adapted or qualified for the creation, revision or extension of international law, which is the affair of all nations, and not to be controlled by any single group of powers, however great and strong. It is not to be controlled by any combination of powers. It has to be developed in a free arena of discussion where the whole world may speak. It is there that these principles of universal law are to be promulgated, and then, if acceptable, they are to be ratified and made concretely, according to the constitutions of the various States, the law of each land.

Now, relying upon its structure as a political and military organization, the League of Nations has treated international law as a secondary matter. It has rejected the unanimous recommendation of its committee of jurists selected to propose a statute for the Permanent Court of International Justice that a series of conferences be held at The Hague for the advancement of international law.

The CHAIRMAN. May I interrupt you there to ask whether you have that official document?

Doctor HILL. Do you mean the official report on that?

The CHAIRMAN. Yes.

Doctor HILL. Yes; I have it.

The CHAIRMAN. You may give it to the reporter later. I would like to have it in the record.

Doctor HILL. I have it here.

(The matter referred to is found on pp. 1–2 of the Report of the Hearings.)

Doctor HILL. Now, I say that the League of Nations rejected that recommendation. The recommendation that this resolution favors was rejected. We do not need to go into a discussion of the question of why they rejected it. I would rather make an excuse for them than to make an

accusation, for this reason, that if I should make an accusation, it might involve something that would be unfair or even false.

Mr. COOPER. Will you please state definitely just who made this proposition originally?

DOCTOR HILL. I will. The proposition was made in a committee of jurists. Do you mean who made it?

Mr. COOPER. Yes.

Doctor HILL. It was made by Hon. Elihu Root, a former Senator of the United States and Secretary of State of the United States. I think it is proper, perhaps, to explain that Mr. Root was not present in that committee as an official representative of the United States. The other members were chosen by the Council of the League, and Mr. Root was invited to come over. This was in July, 1920, and it was expected that the United States, which was having some controversy over this subject—the country was in the midst of a Presidential election—might come into the League of Nations, and to go on and prepare that statute without any representation on the part of the United States, it was felt, would diminish its prestige. When this distinguished jurist from America went over, he was accompanied by James Brown Scott as an assistant, or secretary, and he sat with great influence in that commission.

The contention of Mr. Root was that this recommendation was highly important. It was a recommendation that he had made before. He had made it when the entrance of the United States into the League of Nations was under discussion. He was an official proposer of a court of justice to decide international questions—that is to say, as a strict court of justice. That proposition had been made under instructions to the first conference, and a plan was proposed, but it was felt at that time that it could not carry with the people of Europe. In the discussions that subsequently followed, Mr. Root emphasized that point. He was, there-

fore, in a certain sense the parent of the idea. He was certainly a strong advocate of it, as he still is, although he has been disappointed by its rejection.

Mr. COOPER. If you will pardon the interruption, those jurists appointed by the League of Nations and Mr. Root were in full accord upon this proposition.

Doctor HILL. Perfectly, and, as stated in this report which I have here, it was unanimously recommended.

Mr. TEMPLE. Was not Mr. Root one of the jurists appointed by the League of Nations to prepare the statute for the International Court, and not merely a go-between in the conferences?

Doctor HILL. He was one of the committee, and he played a very conspicuous rôle on it, as he usually does.

Mr. COOPER. I meant, by my question, to bring out the fact that they were all agreed upon this proposition.

Doctor HILL. Yes, sir. This recommendation in the report to the league in which the project or statute for the court was presented, was unanimous on the part of that committee of jurists.

Mr. FAIRCHILD. Were you going to read the recommendation at this time?

Doctor HILL. I will not take the time to read it, but it may go into the record. I hope you will not overlook it, because it is a matter of major importance. (See pp. 1–2 of the Report of the Hearing.)

The CHAIRMAN. I am very much impressed with its importance. Do you happen to have in your file copies of the speeches made by Mr. Root and the other jurists in support of the Root proposal? I think it would add much to the value of this record if we had those speeches, especially Mr. Root's speech.

Doctor HILL. I have a report of this committee of jurists, in which is given a record of the proceedings, and the remarks of Mr. Root upon the subject. That can be placed in your

record. (See Scott, *The Project of a Permanent Court of International Justice,* pp. 136–138; and Dr. Scott's Letter and Article on pp. 10–20 of the Report of the Hearing.)

The CHAIRMAN. We will appreciate that very much.

Mr. COOPER. Your statement is exceedingly interesting and instructive to me, and I hope you will pardon my interruptions.

I want to ask one other question, and that is, in view of the unanimity voiced by those jurists and Mr. Root on this proposition, do you know now of any reason why they should not approve the passage of a resolution like this?

Doctor HILL. That question is an entirely proper one, but the answer might be exceedingly improper. Mr. Chairman, I would not like to make a public accusation here against any nation with which we are in friendly relations. It would not help the cause, and I think we should now avoid attacking the League of Nations, or any of its decisions, or any of its propositions. Our President, Mr. Coolidge, has designated it as "a foreign agency," and foreign agencies are exempt from our criticisms unless they are forced upon us and we are told that we must be a part of them, or must be submitted to them, or subjected to their supremacy, or something of that kind. Then, of course, we come back and resist that insistence. But let us not forget, apart from that, that if we are ever to have a real international court of justice based on law, we shall have to have it in combination with the 48 nations, great and small, that are now organized in the League of Nations and in the so-called Permanent Court of International Justice.

Now, if we want to march together to a higher and better victory, we must not try to slay our companions on the way, and we must not mutilate them, but we must imbue them with the spirit of this recommendation. They were thinking too much of power and too little of justice when they rejected this recommendation. This is a capital fact that they must recognize, and we must help them see why they

rejected it. I can say that I have a suspicion that there are some nations that still do not want to be bound by explicit rules of law or rules of action.

* * * * *

Mr. COOPER. I can see that you might be reluctant to answer my question, but I wonder what motive could possibly have actuated persons who would recommend this through official representatives, and then reverse their position upon a thing of such vital importance.

Doctor HILL. Well, political organizations sometimes find it is not difficult to change their position when there are reasons.

Mr. COOPER. Upon judicial questions?

Doctor HILL. Upon all questions.

Mr. HULL. I am curious to know whether Doctor Hill favors this resolution or does not.

Doctor HILL. That may appear as a proper inference at the end of my remarks.

Mr. HULL. It is not clear to me now whether he is for it or against it.

Doctor HILL. To me that is one of the very best indications that I have been discussing it in a judicial spirit, which I have tried to do. I stated in the beginning that I did not come here to urge anything, but I have come here to expound what I believed to be the truth, and to put it into such phrases as would make clear the attitude of my own mind. At the end of my remarks, I shall confide to you, gentlemen, what my position is in regard to this resolution, but, first, I prefer to give the reasons for holding those views.

Mr. ELLIS. I have become infected with a strong suspicion that you are in favor of it.

Doctor HILL. Now, it is true that after refusing to accept the advice of this committee of jurists, the league has assumed the task of making a codification of international law under its own auspices and control. The assumption of control by a single group of nations will be regarded by many

persons as a denial of the equality of nations—a denial already embodied in the constitution of the league—and it will, therefore, tend to diminish the prestige of its work, although conducted in good faith and by able men. Just as the Permanent Court of International Justice suffers in some countries because it is the league's court, there would be an opportunity to complain about the league's attempt by itself to codify international law, because it may be said that it is the league's law. That would be a misfortune, and it is something that we ought, if possible, to avoid. Now, I have had the boldness to state, and it did not require much courage, that in the constitution of the league of nations the equality of States is denied, and that that denial is embodied in the constitution of the league. Perhaps, some one may wish me to make that statement good, and I will do so. What is the reason for the differentiation of the membership of the League of Nations into two bodies, one the council and the other the assembly?

Why is it that the great powers have permanent political representation in it, the council, whereas the other powers are not to have any members except upon the election of the whole assembly once in a while, but if the wheel is to go all the way around, it will take a long time for each one of those powers to have a representative in the council. Now, upon what principle is this inequality based? It is based upon an inequality of power, magnitude, and importance. Now, what kind of power is that? Is it not military and naval power, and the power of wealth, population, etc.? In the league the members are unequal in prerogatives, because they are unequal in power. This denial of equality is basic to the whole organization. It is basic also to the Permanent Court of International Justice, the judges of which are elected by two bodies, in one of which only the great powers have permanent membership because they are great powers. Here again the juridical idea is subordinated to the will of the stronger.

Therefore, I say that there is a denial of the equality of nations in the very constitution of the League of Nations, and they know it; it is indisputable, and I have never heard anyone say to the contrary. The reason for it is that the great powers have not thus far put themselves upon a juridicial basis of equality with the other powers, and they may never do so.

Mr. HULL. That same thing is found in the Constitution of the United States.

Doctor HILL. In what respect?

Mr. HULL. In respect to representation of the States in the Union. There are large States of enormous size and there are very small States. That inequality exists.

Doctor HILL. The inequality exists in the area and population of the States, but in the body where the States as such are represented, there is no inequality, and the smallest State has the same number of Senators as the largest State. Representation in this House of Representatives is a representation based not upon States but upon the population of the whole country and, of course, it must be proportionate to the population wherever the population lives. A representative in this House is not sent here because it is a New York, or New Jersey, or Wyoming constituency.

Mr. HULL. We have got to deal with realities.

Doctor HILL. Those are realities.

Mr. HULL. And they are dealing with realities there.

Doctor HILL. They are not dealing with them in the judicial temper. They are dealing with them in the political and military temper.

Mr. HULL. This is a political and military world, in which the judicial element enters into it.

Doctor HILL. In the league the judicial element is secondary.

Mr. HULL. A secondary task.

Doctor HILL. That is what I am trying to illustrate. I hope I have sufficiently illustrated it.

The CHAIRMAN. That is what you are trying to overcome.

Doctor HILL. If we are ever to have any world law as the basis of world justice, that is what we must overcome. I am not here to say we can overcome it. I may be dead a thousand years and rest with the bones of my fathers a thousand years and never see it, and yet I believe in it, gentlemen.

From the foregoing statement of facts, it would appear that, if there is to be any general "extension of the empire of law and the development of all agencies for the administration of justice," to use the expression employed by the league's advisory committee of jurists, which the committee of jurists unanimously declared was "urgently required for the security of States and the well-being of peoples," there should be a free and unrestricted examination of the subject by the whole Society of States, irrespective of the predominance of any particular powers or combinations of powers. It is such a general conference, I suppose, which the House Joint Resolution 221 is designed to recommend.

It must be obvious to all who knew the nature of the procedure involved that "the codification of international law" is an undertaking not to be accomplished at a single session of any conference. It is, therefore, the principle of a general codification that is here aimed at and not immediate achievement of a completed code.

With regard to the timeliness of such a convocation as is suggested by this resolution, the determination of the time for such a general conference to meet must, of course, be left to the judgment of the President and his advisers, who will, of necessity, take into consideration not only the careful preparation essential to making such a conference fruitful of good results, but the disposition of the Governments with regard to participation in it and their probable willingness to assent to any extension of international law.

Now, upon that point, one moment of divergence. It may

be that we shall find when the test is applied that there are nations who want no extension of international law; they want the privilege of conquering territory and annexing populations and ruling inferior peoples wherever it is their imperial pleasure to do it, and if that is their temper they will never consent to any juridical procedure that will eventuate in binding them to rules of action which restrain them from conquest, from annexation, from the subordination of peoples in the imperial spirit, and that is the thing above all things which it is desirable to have tested, and when the test comes I believe it will be found that the people, conscientious, thoughtful, honest, well-meaning, peaceful people of every nation that can get an opportunity to express itself, will wish that this process shall be carried forward to its completion.

We talk of vague things when we talk of the termination of war. Anyone who knows history and anyone who knows the psychology of war realizes how futile it is in a mere pacificist spirit to pray and talk about the termination of war. It is not the termination of war that is the matter of great interest. To prevent the initiation of war is the great point which we should have in consideration, and I have ventured to bring here this morning an address that I delivered some time ago, copy of which I will leave with the chairman, in which I have stated this:

> Undoubtedly, there is a limit beyond which international law can not go in imposing such restraint. It can not go so far as to deny the right of a free and independent nation "to levy war."

We have that constitutional right.

> What it can do is to seek and obtain voluntarily accepted limitations upon the exercise of the war power. That, to some extent, has been already done, and the result has been in no respect to weaken the prestige or lower the dignity of the sovereign states that have freely accepted and applied these limitations.
>
> More and more it has become evident that the proper place for the incidence of international law to fall is at the beginning, and not at the end, or in the midst of military operations. Humanizing warfare has proved an illusory process, and an agreement to

preserve territorial integrity and political independence, after invasion and occupation, is a futility. It implies either that mere diplomacy by an international conference can reverse a conquest, without taking its gloves off, or that a local war is to be rendered nugatory when it is finished by a new war, in which the collectivity will overwhelm the victor and wring from him a renunciation of his conquest. It is only on the crest of a great wave of victory by allied and associated nations, who already had the aggressor under their feet, that such a fantastic conception of enforcing peace by general menace could have been seriously entertained by clear-headed men. The cooler judgment of a less emotional period has had a profound effect upon public opinion in that regard.

That the method adopted at The Hague, which aimed at premonitory and restrictive commitments, was the sound and true one, should now be evident to all; but it was chiefly applied at the wrong point, namely, the conduct of warfare, rather than to the initiation of military action.

The method consists in applying the restraints of law—of a law which is, at the same time, the law of each nation, in the sense that it is not imposed from the outside, and of all nations, in the sense that it is their common achievement, made in their common interest, and that violations of it are marks of national dishonor and untrustworthiness.

Now, the particulars which I mentioned a few moments ago, with regard to the time of calling this conference, do not affect the question of public policy on the part of the United States, which has been uniform in its support of international law and its extension by common consent to the specific interests of international conduct and intercourse. It is highly probable that the United States will never regard as binding upon itself any rule of action resolved upon by any group of nations, however large, which has not received its reasoned consideration and its free consent as a rule of international law. Now, if this is a just prerogative of the United States, it points toward a general conference as a proper and necessary source of authority for changes and extensions in the law of nations.

I thank you for the patience with which you have listened to me.

Mr. HULL. I thank you for your conclusions, and while I have listened hopefully, I fear it gets nowhere.

The CHAIRMAN. In behalf of the committee, I thank you for the light you have thrown on the subject.

Mr. ELLIS. You spoke of limitations already in vogue in the initiation of war by nations. Just to what did you refer?

Doctor HILL. I had in my mind among other things a matter to which Mr. Charles Henry Butler referred yesterday in his remarks before this committee. He spoke of the decision that was accepted in one of the conferences, the second Hague conference, with regard to the collection of contract debts. It had been the custom for European powers after having made contract debts with our Latin-American neighbors, and with other peoples besides, when those contracts were not carried out according to their interpretation of the contracts, to send a ship with the menace of bombarding the port or taking possession of the customhouse and taking from the tills of the public treasury through the customhouse, the amount of money which they regarded as coming to them under the contracts.

That was a plain exercise of *force majeure* without any authorization other than the will to do it, fortified, perhaps, by the idea in the mind of the person carrying out such a program that it was just, the money was owed, and they would go and collect it, and collect it under the menace of guns.

Now, there was brought forward by Gen. Horace Porter, our former ambassador to France, a well known soldier and citizen, a declaration to the effect that it should be agreed that before any military act of that kind, any menace of force was manifested, there was to be obtained a judgment that the debt was due, and the amount of the debt, and when that judgment was obtained, if it was, that it was due, and the amount of the debt, if then the debtor refused to recognize the judgment, it would not be contrary to justice to collect the debt; but that the debt was not to be collected until in some court of adjudication it was shown that there was a debt, because in many cases these were perfectly fraudulent

claims; and, in the second place, the amount claimed was sometimes not only preposterous and ridiculous, but was simply named for the sake of robbing a poor and defenceless nation.

Now, that Porter resolution became a part of a convention which was adopted by the conference and which has been ratified, I think, by most, if not all of the European as well as the American States. I claim that was a distinct advance.

Mr. HULL. What conference was that?

Doctor HILL. The second conference at The Hague, 1907. I claim that was a distinct advance in the limitation of the initiation of military action. You all remember, gentlemen, how Mr. Cleveland broke into the line on the Venezuela proposition, when he said to a certain power, "Before you collect your debt or make your claim"—which was a claim for territory—"you will have to prove it." I remember that at that time it sounded like a threat of war.

Mr. VAILE. The whole world caught its breath.

Doctor HILL. Yes; and whatever we might think of Grover Cleveland, and whatever our relations, whatever our attitude, I think we are obliged when we go to sleep at night and make our prayer to God, to say Cleveland was right.

Mr. FAIRCHILD. He was unanimously applauded in a Republican House.

Mr. MCREYNOLDS. To carry out this idea it would be necessary to begin conferences with all the nations and to have agreements in this conference as to what international law should be, and then to have it ratified by all the nations.

Doctor HILL. Yes.

Mr. TEMPLE. In that sense there must be a contract which is ratified by the nations, as a treaty, and only those ratifying would be bound by the code fixed in the treaty.

Doctor HILL. Certainly.

Mr. TEMPLE. That, it seems to me, touches upon the point of equal representation. The great power signs a con-

tract and the little power signs a contract and they are equal as parties to the contract, whatever their magnitude and importance may be.

Doctor HILL. Yes.

Mr. EDWARDS. Then it would seem that this conference would have to meet and continue to meet at stated times to provide for administering the laws they would agree on if other nations would ratify them.

Mr. MOORE of Virginia. I understand that a great many of the regulations promulgated by the second conference never were ratified.

Doctor HILL. I think it could hardly be said that a great number were not ratified. The truth is that with regard to some of the conventions of the conference—by convention I mean a form of treaty in which the results of the conference are expressed, which we call a convention—that in many cases reservations were made; that is, some nation was not quite prepared to accept that which other nations were, so that while they signed unanimously or nearly so, there were some reservations, and, of course, where a reservation was made there was no obligation. Then the next step was to take the convention in the form of a treaty before the ratifying body, whatever it might be, in our case, the Senate of the United States, and then those conventions were ratified, and then they became in our case and in all similar cases, a part of our own law, because by our Constitution a treaty is a law, it is a part of the supreme law of the land, and so this law becomes our law. We are bound to it legally as well as in honor, and it is the law.

Mr. MOORE of Virginia. What I meant was this, that many of the rules or conventions, whatever term you may use, that were put forward by the second Hague conference, were never completely ratified by all the nations participating in that conference.

Doctor HILL. That is true.

Mr. MOORE of Virginia. That bears upon the question you

were raising a while ago as to the enormous length of time that may be required to effect the purpose of this resolution.

Doctor HILL. Yes.

Mr. MOORE of Virginia. You in your very able statement, expressed in very beautiful English, have not left me as hopeless as my colleague, Mr. Hull, but I take it that it is a very strong argument in favor, I will not say, of the League of Nations, but a league or combination of nations, to make possible the outlawry of war—that is where I am left by your very illuminating and very interesting statement.

Doctor HILL. I thank you, sir. In conclusion, let me say I have no illusion with regard to my being the organ of expressing the terms upon which this universe is finally to be made a peaceful paradise; I have no illusion on that subject. This work for peace is a great work, but it will never go to fruitage until there is justice, and so our approximate task is to promote universal justice as far as we can. We have limitations on that subject in our own municipalities and in our great country. We must not, therefore, expect that we are going by a few words, however true, however wise, however potent, to reform the whole world at once, but it is everything to be in the procession and to be in line toward the great goal. I thank you. [Applause.]

The testimony given at the Hearings before the Committee on Foreign Affairs of the House of Representatives, Sixty-ninth Congress, First Session, on May 3–22, 1926 (obtainable in pamphlet form at the Government Printing Office) is of very great importance and should be studied.

III. LETTER OF THE SECRETARY OF STATE

DEPARTMENT OF STATE,
Washington, May 11, 1926.

Hon. STEPHEN G. PORTER,
Chairman, Committee on Foreign Affairs,
House of Representatives.

MY DEAR MR. PORTER: Consideration has been given by the department to your request of April 16, 1926, for a report on House

Joint Resolution 221, requesting the President to propose the calling of a third Hague conference for the codification of international law.

Nearly a year ago the department was approached informally by the Netherlands Government as to the standpoint of the United States Government in regard to an eventual third peace conference at The Hague and the program for such a conference, having particularly in view the codification of the international law of peace.

It was suggested in the note from the Netherlands minister that the conference could also consider such subjects as the United States Government might deem advisable in the field of the international law of war.

In reply I informed the legation of the Netherlands that the Government of the United States would give its hearty approval of and cooperation in a third peace conference to be called by the Netherlands Government at a convenient time for the sole purpose of promoting the codification of the international law of peace under three conditions, namely:

(1) That all interested states, whether or not members of the League of Nations, should have freest opportunity to participate without embarrassment and to discuss on their merits all pertinent projects submitted to the conference, whether brought forward by the committee of the League of Nations or by other committees and jurists,

(2) That full account should be taken of the preliminary work of jurists in the Western Hemisphere as well as those in Europe. Accordingly the Government of the United States would expect the Pan American jurists acting under the auspices of the American Institute of International Law to proceed with their important undertaking, and it would expect that their collaboration would be considered and welcomed by a third Hague peace conference quite as much as that of the committee of jurists set up by the league, even though the subjects to be considered by both groups might prove to be the same, and

(3) That the conference should be called at such time as the projects have been suitably prepared and the preliminary work of the Pan American jurists is available for consideration.

In reply I received a note from the Netherlands Legation stating that the Netherlands Government had taken cognizance of the contents of my note and that the three conditions which I have mentioned above corresponded entirely with the views of the Government.

You will observe that the correspondence between this Government and the Netherlands Government did not relate to a concrete and definite proposal concerning a conference for the codification of international law but was only an exchange of views in regard to the standpoint of the two governments in respect of an eventual conference of this kind.

I consider it highly desirable that this Government should cooper-

ate in any earnest endeavor to bring about a codification of international law. While I am not at the moment prepared to say that the time is propitious for an international conference on the subject, I think that if Congress is favorably disposed toward participation by the United States in such a conference it might well make an appropriation which would enable this Government to send representatives to a conference whenever an invitation to attend is received.

I am, my dear Mr. Porter,
Sincerely yours,

FRANK B. KELLOGG.

IV. REPORT OF THE HOUSE COMMITTEE REGARDING THIRD HAGUE CONFERENCE

JULY 3, 1926.—Referred to the House Calendar and ordered to be printed

Mr. PORTER, from the Committee on Foreign Affairs, submitted the following

REPORT

[To accompany H. J. Res. 221]

The Committee on Foreign Affairs of the House of Representatives, to whom was referred H. J. Res. 221, requesting the President to propose the calling of a third Hague conference for the codification of international law, having had the same under consideration, reports it back without amendment, with the recommendation that the resolution be passed.

* * * * *

The first principle of American philosophy in relation to international relations is that the United States should not enter into any permanent foreign alliance, military or political in character, directly or indirectly.

The second principle of American philosophy in relation to international relations is that international controversies should be settled by judicial decision and not by war.

Judicial decision must be based upon law, and international judicial decision must be based upon international law.

* * * * *

The official interests and activities in relation to the codification of international law in the Eastern and Western Hemispheres are not exclusive or competitive. They should lead to a general international conference representing all the nations upon a basis of equality, where no power or powers shall be predominant, a conference free from military and political control and purposes, a conference wholly for the advancement of international justice and the settlement of international controversies by judicial decision.

The advisability of this third Hague conference in succession to the first two of the series is well founded upon the fruits of the previous two conferences.

* * * * *

The letter of the Secretary of State dated May 11, 1926, to your chairman of the Committee on Foreign Affairs makes it clear that the conference would at least have the benefit of the official conventions prepared in the Eastern and Western Hemispheres.

The positive results of a third conference would in all probabilities be more important than those of either of its predecessors. It is in independent conference that the nations can best agree upon the law which is to be applied to the disputes which may arise between or among them, because they have agreed to the law in advance of the disputes to which it is applied.

It is in independent conference that the nations can best extend the domain of law to questions which hitherto have been considered as political, and by agreement give to them the force of law.

It is in periodical conference of the nations that the law can keep abreast of judicial conditions so that between nations as between individuals there may hereafter be no inter-

national wrong without an adequate international remedy.

The hope of the future is through law devised by the nations in conference and administered by appropriate agencies.

H. J. Res. 221, reported by the Committee on Foreign Affairs of the House of Representatives, provides this method of procedure through international conference and international law, in accordance with the traditions of the United States, and a third Hague peace conference, as proposed by H. J. Res. 221, is in accordance with the present policy of the Government of the United States as evidenced by the official letter of the Secretary of State under date of May 11, 1926, to your chairman, informing him and through him the committee, that the Government of the United States is in favor of a conference and requesting an appropriation in order to enable the Government to participate in such a conference when it may be assembled.

The committee believes that no greater contribution to world order can be made by the United States than the concept contained in this resolution of an association of all free nations, equal and sovereign, dealing directly with one another in free and independent conference at The Hague for the judicial settlement of international controversies by persuasion and the application of justice without the exercise of force.

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